SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 44

L. M. DAKIN (SUCCESSOR TO A. M. ANDERSON), AS RECEIVER OF THE FIRST NATIONAL BANK OF ST. PETERSBURG, PETITIONER,

vs.

TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

No. 2836

A. M. ANDERSON, as Receiver of the First National Bank of St. Petersburg, a Banking Association Organized and Existing under the Laws of the United States, Plaintiff,

versus

PEOPLES BANK OF CLEARWATER, a Corporation Organized and Existing under the Laws of the State of Florida, Defendant

Tampa. Civil Action. Damages: $3,500.00

DECLARATION—Filed Feb. 1, 1932

Comes now the plaintiff, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, a banking association organized and existing under the laws of the United States, said plaintiff having been prior to the institution of this suit duly appointed and commissioned Receiver of said First National Bank of St. Petersburg under the provisions of the laws of the United States which authorize the appointment of such a Receiver, and now acting with full authority of law as such Receiver, by his attorney, D. C. McMullen, and sues Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida, for that heretofore, to-wit, on June 7, 1930, the de-
[fol. 2] fendant was indebted to the First National Bank of St. Petersburg, aforesaid, in the sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time lent by said First National Bank of St. Petersburg to the defendant at its request.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time paid and expended by said First National Bank of St. Petersburg for the use of the defendant at its request.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time received by the defendant for the use of the said First National Bank of St. Petersburg.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money found to be due from the defendant to the plaintiff on accounts stated between them. And being so indebted the defendant in consideration thereof then and there promised the said First National Bank of St. Petersburg to pay it the said sum of money on request, together with interest thereon at the rate of eight per cent per annum. Yet, the defendant, though requested, has not paid the same, or any part thereof to the plaintiff, but refuses so to do to the damage of plaintiff in the sum of Three Thousand Five Hundred Dollars ($3,500.00), therefore, he brings suit.

D. C. McMullen, Attorney for Plaintiff.

EXHIBIT TO DECLARATION

Bill of Particulars

Peoples Bank of Clearwater to A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, Dr.

To the sum of $2,540.34 for money collected on, to-wit, June 7, 1930, by defendant for account of First National Bank of St. Petersburg	$2,540.34
[fol. 3] To the sum of $90.96 for money collected on, to-wit, June 7, 1930, by defendant for account of First National Bank of St. Petersburg	90.96
Total	$2,631.30

To interest from, to-wit, June 7, 1930, at the rate of eight per cent per annum on $2,631.30.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEAS—Filed March 23, 1932

Comes now the defendant, Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida by its undersigned attorneys, and for pleas to the plaintiff's declaration, says:

I. That it was never indebted as alleged.

II. That it never promised to pay the sums of money set forth in plaintiff's declaration as set forth in said declaration.

III. And for a third plea, the defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit, and still is, indebted to the defendant in an amount equal to the plaintiff's claim for that said First National Bank of St. Petersburg, Florida, was on the 7th day of June, A. D. 1930, indebted to the defendant in the sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time lent by this defendant to the said First National Bank of St. Petersburg at its request.

[fol. 4] And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time paid and expended by the Peoples Bank of Clearwater for the use and benefit of the First National Bank of St. Petersburg, at its request.

And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time received by the First National Bank of St. Petersburg for the use of the Peoples Bank of Clearwater.

And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money found to be due from the First National Bank of St. Petersburg to the Peoples Bank of Clearwater on accounts stated between them; which amount of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars the defendant is willing to set off against the plaintiff's claim.

Defendant's exhibits marked Exhibits "A," "B," "C" and "D" are hereto attached in lieu of a bill of particulars.

IV. And for fourth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Three Hundred Forty-five and 69/100 ($345.69), for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123615, dated June 4, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached

[fol. 5] and made a part hereof and marked Defendant's Exhibit "A", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and promptly presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of Three Hundred Forty-five and 69/100 ($345.69) Dollars against the plaintiff's claim.

V. And for fifth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of One Thousand Five Hundred Twelve and 62/100 ($1,512.62) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123640, dated June 5, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "B", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of One Thousand Five Hundred Twelve and 62/100 ($1,512.62) Dollars against the plaintiff's claim.

VI. And for sixth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Three *Dollars* Thirty-two and 21/100 ($332.21) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier [fol. 6] one certain check or draft numbered 123656, dated June 6, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "C", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and promptly presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of Three Hundred Thirty-two and 21/100 ($332.21) Dollars against the plaintiff's claim.

VII. And for seventh plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Seven Hundred Seven and 88/100 ($707.88) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123672, dated June 7, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "D", payable to the order of Peoples Bank of Clearwater, which check or draft was not paid because on the date said check or draft was received by this defendant the First National Bank of St. Petersburg closed its doors and ceased operating as a banking institution, and therefore, the presentation of said check or draft to the said Chase National Bank of New York would have been futile. Wherefore this defendant is willing to set off the said sum of Seven Hundred Seven and 88/100 ($707.88) Dollars against the plaintiff's claim.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for Defendant.

[fol. 7] *Duly sworn to by E. H. Ashcraft. Jurat omitted in printing.*

DEFENDANT'S EXHIBIT "A" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,615. St. Petersburg, Fla., Jun. 4, 1930.

Pay to the order of Peoples Bank, Clearwater, $345.69, $345 and 69 cents.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any [fol. 8] National Bank, State Bank, Bank of Trust Com-

pany. Prior indorsements guaranteed. Jun. 5, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63-209. 63209. Taver Bayly, Cashier.

DEFENDANT'S EXHIBIT "B" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,640. St. Petersburg, Fla., Jun. 5, 1930.

Pay to the order of Peoples Bank, Clearwater, $1,512.62, 1,512 and 62 cents.

C. H. Cook, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any National Bank, State Bank. Bank *of* Trust Company. Prior indorsements guaranteed. Jun. 6, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63209 63209. Taver Bayly, Cashier.

[fol. 9] DEFENDANT'S EXHIBIT "C" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,6656. St. Petersburg, Fla., Jun. 6, 1930.

Pay to the order of Peoples Bank, Clearwater, $332.21, 332 and 21 cts.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any National Bank, State Bank, Bank *of* Trust Company. Prior

indorsements guaranteed. Jun. 7, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63209. 63209. Taver Bayly, Cashier.

DEFENDANT'S EXHIBIT "D" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,672. St. Petersburg, Fla., Jun. 7, 1930.

Pay to the order of Peoples Bank, Clearwater, $707.88, 707 and 88 cts.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

[fol. 10] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed March 24, 1932

Now comes the plaintiff, aforesaid, and joins issue on defendant's first plea.

And for replication to defendant's fourth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, on the Central National Bank of St. Petersburg, Florida, and on First Securities Bank, of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or

cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida; and First National Bank of St. Petersburg, Florida, charged against First Securities Bank, of St. Petersburg, Florida, all checks or drafts drawn upon said First Securities Bank, and that said check or draft men-
[fol. 11] tioned in defendant's said fourth plea is, therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of St. Petersburg, before said check or draft was presented to Chase National Bank for payment.

And for replication to defendant's fifth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida, and that said check or draft mentioned in defendant's said fifth plea is therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of

St. Petersburg before said check or draft was presented to Chase National Bank for payment.

[fol. 12] And for replication to defendant's sixth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida, and that said check or draft mentioned in defendant's said sixth plea is, therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of St. Petersburg before said check or draft was presented to Chase National Bank for payment.

And for replication to defendant's seventh plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collec-
[fol. 13] tion which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts

drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the First National Bank of St. Petersburg, Florida, which balance was liquidated by Central National Bank of St. Petersburg, Florida, paying the difference to the First National Bank of St. Petersburg, Florida, by means of a draft on the Chase National Bank of New York, and said check or draft mentioned in said seventh plea is, therefore, without consideration and void.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATIONS—Filed March 28, 1932

Comes now the defendant, Peoples Bank of Clearwater, and says that the first, second, third and fourth replications of the plaintiff herein are each separately insufficient, and this defendant therefore demurs to same separately, and for substantial matters of law intended to be argued, assigns the following:

1st. The matters and things set forth in said replications and each of them set forth no defense to the pleas and each of them of this defendant.

2nd. Said replications and each of them are an attempt to vary a valid written instrument complete on its face by parole testimony.

3rd. The facts set forth in said replications and each of them affirmatively show that this defendant has the legal right to sue on and collect the drafts set forth and described in the pleas of this defendant.

4th. The replications and each of them affirmatively show that the drafts set forth and made a part of this defend-

ant's pleas were executed and delivered to this defendant for a valuable consideration moving from this defendant to the First National Bank of St. Petersburg.

5th. Said replications and each of them attempt to defend against the pleas of this defendant by way of confession and avoidance, and said replications confess and utterly fail as a matter of law to avoid.

6th. Said replications and each of them fail to set forth sufficient facts to warrant the conclusion that the drafts [fol. 15] attached to and made a part of the defendant's pleas are without consideration and void.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for Defendant.

I hereby certify that in my opinion the above and foregoing demurrers are well founded in point of law.

Cyril E. Pogue, of Counsel for the Defendant.

Duly sworn to by Cyril E. Pogue. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER—July 29, 1932

This cause having come on to be heard upon the motion of plaintiff to strike defendant's second plea, the motion of plaintiff to require defendant to file a more specific bill of [fol. 16] particulars in support of its third plea, and the demurrer of defendant to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas, and the same having been argued by counsel, and the Court being fully advised in the premises, upon consideration thereof, it is Ordered and Adjudged as follows:

1st. That the motion to strike defendant's second plea be and the same is hereby granted.

2nd. That the motion to require defendant to file a more specific bill of particulars in support of its third plea be and the same is hereby granted and defendant is allowed five days from the date hereof in which to file a more specific bill of particulars.

3rd. That defendant's demurrer to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas be and the same is hereby sustained to each and every of said pleas.

4th. That plaintiff be and he is hereby allowed ten days from the date hereof in which to file further replication, or replications, to defendant's pleas as he is advised, and to which replication, or replications, if filed, defendant shall demur or rejoin within ten days therefrom.

Done and ordered at Tampa, Florida, this the 29th day of July, 1932.

Alexander Akerman, United States District Judge.

[fol. 17] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed Aug. 1, 1932

Now comes the plaintiff, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, and leave first being had by order of the Court, files this his replication to defendant's third, fourth, fifth, sixth and seventh pleas, and says that plaintiff's cause of action herein is for money collected on, to-wit, June 7, 1930, by defendant as agent for the First National Bank of St. Petersburg, as appears by the bill of particulars attached to plaintiff's declaration, and neither First National Bank of St. Petersburg, nor plaintiff has ever consented that defendant might set off the same against any alleged indebtedness due by plaintiff to defendant.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATION—Filed Aug. 9, 1932

Comes now Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida, by its undersigned attorneys, and says that the

replication of the plaintiff heretofore filed herein to the defendant's pleas number III, IV, V, VI, and VII, is bad in substance.

Wherefore this defendant demurs to the same and for substantial matters of law intended to be argued assigns the following:

1st. Sufficient facts are not set up to constitute a legal defense to the pleas replied to.

2nd. There are no facts set forth in said replication which as a matter of law would change the substantial rights of this defendant.

3rd. The replication is a departure in pleading.

4th. The plaintiff by said replication is attempting to recover on a cause of action different from the cause of action sued on in its declaration.

5th. It affirmatively appears by the record in this cause that this Court has already adjudicated the sufficiency of the facts set forth in the replication.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for the Defendant.

[fol. 19] I, Cyril E. Pogue, of counsel for the defendant in the above and foregoing cause, hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

Cyril E. Pogue.

Duly sworn to by Cyril E. Pogue. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

REPLICATIONS TO THIRD PLEA—Filed Sept. 23, 1932

Now comes the plaintiff, aforesaid, and for replications to defendant's third plea and each and every count thereof says:

First. That the First National Bank of St. Petersburg never was indebted as alleged.

[fol. 20] Second. That the claims set forth in each count of said plea are not separate and distinct, but are one and

the same as set forth in defendant's fourth, fifth, sixth and seventh pleas and arose in the following manner, to-wit:

Certain checks or drafts were deposited in the usual course of business with Peoples Bank of Clearwater by its customers, which checks or drafts were drawn on the First National Bank of St. Petersburg, Central National Bank of St. Petersburg and First Securities Bank of St. Petersburg and sent for collection and remittance by Peoples Bank of Clearwater to First National Bank of St. Petersburg. These checks or drafts were collected by First National Bank of St. Petersburg charging such as were drawn on it against the accounts of the various customers by whom they were drawn. The checks or drafts drawn on Central National Bank it exchanged or cleared with Central National Bank for checks or drafts held by Central National Bank and drawn on First National Bank of St. Petersburg, the balances on June 4th, 5th and 6th, 1930 being in favor of Central National Bank, which were paid by First National Bank of St. Petersburg, and the balance on June 7th, 1930 being in favor of First National Bank of St. Petersburg, which was paid by Central National Bank. The checks or drafts drawn on First Securities Bank were charged by First National Bank of St. Petersburg to First Securities Bank, the latter having an account with the First National Bank of St. Petersburg. There were four of these cash letters and remittances therefor were attempted to be made by First National Bank of St. Petersburg to Peoples Bank of Clearwater by separate drafts on Chase National Bank of New York as follows: One for Three Hundred Forty-five and 96/100 Dollars ($345.96), one for One Thousand Five Hundred Twelve and 62/100 Dollars ($1,512.62), one for Three Hundred Thirty-two and 21/100 Dollars ($332.21), [fol. 21] and one for Seven Hundred Seven and 88/100 Dollars ($707.88), copies of these drafts being defendant's Exhibits A, B, C and D, respectively. None of these drafts were paid because First National Bank of St. Petersburg closed on June 9, 1930, before they were presented to Chase National Bank of New York for payment. The total amount of these drafts was Two Thousand Eight Hundred Ninety-eight and 40/100 Dollars ($2,898.40) and Peoples Bank of Clearwater carried no account or deposit with First National Bank of St. Petersburg, nor did First National Bank of St. Petersburg carry any account or deposit with

Peoples Bank of Clearwater, although for a long period of time each bank had been sending checks and drafts to the other for collection and remittance. Wherefore, plaintiff alleges that there is no mutuality in the debts or demands existing between the plaintiff and the defendant at the commencement of this action and defendant is not entitled to the set-off sought in its said plea.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATIONS—Filed Sept. 23, 1932

Comes now the defendant in the above cause, by his undersigned attorneys, and for demurrer to the second replication contained in plaintiff's replications to defendant's third plea, says that said replication is bad in substance, and for substantial matters of law intended to be argued, assigns the following grounds:

1st. The matters and things set forth in said replication set forth no defense to the third plea of said defendant.

2nd. The facts set forth in said replication affirmatively show that this defendant has the legal right to sue on and collect the drafts set forth and described in the third plea of said defendant.

3rd. The replication affirmatively shows that the drafts set forth and made a part of this defendant's pleas, and referred to in plaintiff's replication, were executed and delivered to this defendant for a valuable consideration moving from this defendant to the First National Bank of St. Petersburg.

4th. Said replication attempts to defend against the third plea of this defendant by way of confession and avoidance, and said replication confesses and utterly fails as a matter of law to avoid.

5th. That the matters and things set forth in the plaintiff's replication show affirmatively that the defendant has the legal right to set-off against the plaintiff.

[fol. 23] 6th. It affirmatively appears by the record in this cause that this Court has already adjudicated the sufficiency of the facts set forth in the replication.

McMullen, McMullen & Pogue, by Cyril E. Pogue, Attorneys for Defendant.

I hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

Cyril E. Pogue, of Counsel for the Defendant.

Duly sworn to by Cyril E. Pogue. Jurat ommitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRERS—Sept. 23, 1932

This cause having come on to be heard upon defendant's demurrer to plaintiff's second replication to defendant's [fol. 24] third plea, and defendant's demurrer to plaintiff's replication to defendant's third, fourth, fifth, sixth and seventh pleas, and the same having been considered by the Court,

It is ordered and adjudged that said demurrers be and they are hereby sustained, and plaintiff having declined to plead further, it is ordered and adjudged that defendant take judgment on its plea of set-off for the balance above plaintiff's claim.

Done and ordered at Tampa, Florida, this the 23rd day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Sept. 23, 1932

This cause having come on to be heard upon motion of attorneys for defendant for judgment on pleas of set-off filed herein, and it appearing that the demurrers filed by defendant to the replications filed by plaintiff have been sustained, and plaintiff declining to plead further, and the Court being fully advised in the premises,

It is considered, ordered and adjudge-, that the set-off alleged in defendant's pleas be and it is hereby allowed; and that the defendant, Taver Bayly, as Liquidator of Peoples Bank of Clearwater, do have and recover of and from A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, the sum of Two Hundred Sixty-seven and 10/100 Dollars ($267.10), together with the sum of Five Dollars ($5.00) costs in this behalf expended.
[fol. 25]. Done and ordered at Tampa, Florida, this the 23rd day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Sept. 30, 1932

A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, Florida, plaintiff, conceiving himself aggrieved by the final judgment made and entered on the 23rd day of September, 1932, in the above entitled cause, does hereby appeal from said final judgment by direction of the Comptroller of the Currency of the United States to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignments of error, which are filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said final judgment was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Fifth Circuit in accordance with the statutes and rules of Court in such cases provided.

D. C. McMullen, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 30, 1932

On motion of D. C. McMullen, counsel for plaintiff, it is hereby ordered, that an appeal to the Circuit Court of Appeals of the Fifth Circuit from the final judgment here-
[fol. 26] tofore entered herein be and the same is hereby allowed, and that a certified transcript of the record

and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered, that this appeal being taken by direction of the Comptroller of the Currency of the United States no bond shall be required.

Done and ordered at Tampa, Florida, this the — day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Sept. 30, 1932

Now comes A. M. Anderson, as Receiver of the First National Bank of St. Peterburg, Florida, plaintiff in the above entitled cause and assigns the following errors:

1st. That the Court erred in entering the order dated July 29, 1932, sustaining defendant's demurrer to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas.

2nd. That the Court erred in entering the order dated September 23, 1932, sustaining defendant's demurrer to plaintiff's second replication to defendant's third plea and defendant's demurrer to plaintiff's separate replication to defendant's third, fourth, fifth, sixth and seventh pleas.

[fol. 27] 3rd. That the Court erred in entering final judgment on September 23, 1932.

Wherefore the said plaintiff prays that the final judgment of the District Court of the United States in and for the Southern District of Florida, in this cause entered, be reversed.

D. C. McMullen, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 30, 1932

To the clerk of the aforesaid court:

You are requested to make transcript of record to be filed in the United States Circuit Court of Appeals for the

Fifth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers:

1. Plaintiff's declaration.
2. Defendant's pleas filed March 23, 1932.
3. Plaintiff's replication to defendant's 4th, 5th, 6th and 7th pleas filed March 24, 1932.
4. Defendant's demurrer to plaintiff's replication filed March 28, 1932.
5. Order sustaining demurrer to plaintiff's replications made and entered July 29, 1932.
6. Plaintiff's replication to defendant's 3rd, 4th, 5th, 6th and 7th pleas filed August 1, 1932.

[fol. 28] 7. Defendant's demurrer to plaintiff's replication filed August 9, 1932.

8. Plaintiff's additional replications to defendant's 3rd plea, filed September 23, 1932.
9. Defendant's demurrer to plaintiff's second replication to defendant's 3rd plea, filed September 23, 1932.
10. Order sustaining demurrer to plaintiff's second replication to defendant's 3rd plea and sustaining defendant's demurrer to plaintiff's replication to defendant's 3rd, 4th, 5th, 6th and 7th pleas, made and entered September 23, 1932.
11. Final judgment.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignments of error.
15. Citation.
16. These directions to the clerk.
17. Acceptance of service of citation and copy of directions to clerk.

D. C. McMullen, Attorney for Plaintiff.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE CITATION

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 30] Minute entry of argument and submi. n, February 20, 1933, omitted in printing.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 6786

A. M. ANDERSON, as Receiver of the First National Bank of St. Petersburg, Appellant,

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

(March 4, 1933)

Before Bryan, Foster, and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 4, 1933

BRYAN, Circuit Judge:

On June 7, 1930, the Peoples Bank of Clearwater, Florida, had collected $2540.34 for the First National Bank of St. Petersburg, Florida; and the St. Petersburg bank had col-
[fol. 32] lected $2898.40 for the Clearwater bank, the money collected by each bank being represented by checks of its customers that had been forwarded to it by the other for collection and remittance. Both banks were acting in the usual course of business as mutual correspondents; neither was a depositor of the other. In an attempted settlement of the amount it had collected, the St. Petersburg bank sent its drafts on a New York bank to the Clearwater bank; but, because of its failure on June 9, the drafts were not paid. In an action against it by appellant as receiver of the St. Petersburg bank to recover the amount due that bank, the Clearwater bank pleaded as a set-off the larger amount due it, and, having itself failed pending suit, appellee as its liquidator recovered judgment for the excess.

Appellant takes the position that it was error to allow a set-off, because, as he says, (1) the Clearwater bank did not have title to the checks which it forwarded to the St. Petersburg bank for collection, since until final payment the depositor of each such check remained the owner of it; and (2) the Clearwater bank held the amount which it had collected for the St. Petersburg bank as the latter's agent. Compiled General Laws of Florida, §4326, provides:

"All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects to set-off, and may be pleaded accordingly. * * * in case the jury shall find a balance for the defendant, such defendant may claim a judgment for the same, and take out execution accordingly."

The right of set-off, while it did not exist at common law, was provided for by statute of 2 Geo. II, ch. 24, s. 4, which enacted that where there are mutual debts between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484; Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615. Independent [fol. 33] debts of the parties may be set off against each other by way of mutual deduction, and so a claim founded on debt may be used by the defendant though it does not arise out of the transaction sued on, provided it tends to defeat or diminish the plaintiff's right to recovery. Scammon v. Kimball, 92 U. S. 363; 24 R. C. L. 851. In Florida, as has already been shown, the defendant may have judgment if the balance be in his favor. The Florida Negotiable Instruments Law provides that "the holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." §6810, C. G. L. It was of no concern to the appellant whether the Clearwater bank held the check for its depositors for collection or for value. McCallum v. Driggs, 35 Fla. 277; Brown v. First National Bank, 86 Fla. 198. Since the Clearwater bank had the right to maintain a suit in its own name for the amount due it by the appellant; it had the right of set-off in a suit against it by appellant for the amount of its indebtedness to the St. Petersburg bank. Farmers Bank v. Penn Bank, 123 Pa. 283; Clarke v. National Bank, —

Mont. —, 252 Pac. 373. The right of set-off under the facts of this case exists notwithstanding the provision in §6834 of the Negotiable Instruments Law to the effect that when a bank receives for collection a check or other negotiable instrument which it forwards to another bank for collection, it shall only be liable after actual final payment is received by it. The last named section deals with the question of due diligence as between a bank on the one hand and its depositors on the other. It does not affect the right of the bank to recover from another bank the amount collected for the former by the latter.

In this case all the checks sent by each bank to the other had been paid in full, and as a result the drawers of the checks had been discharged. It was no longer possible for either bank to return to its depositors the checks which it [fol. 34] had received from them. Each bank was debtor in the same capacity that it was creditor. One was no more an agent than the other. If the Clearwater bank did not have a right to sue, neither did appellant. In our opinion either bank had the right to sue or to plead set-off if sued, because mutual debts were due to and from them in the same capacity. 24 R. C. L. 858.

The judgment is affirmed.

[fol. 35] In United States Circuit Court of Appeals

No. 6786

A. M. Anderson, as Receiver of the First National Bank of St. Petersburg,

versus

Taver Bayly, as Liquidator of the Peoples Bank of Clearwater

Judgment—March 4, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, be condemned to pay the costs of this cause in this Court.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,627. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 44. L. M. Dakin (successor to A. M. Anderson), as receiver of the First National Bank of St. Petersburg, petitioner, vs. Taver Bayly, as liquidator of the Peoples Bank of Clearwater. Petition for a writ of certiorari and exhibit thereto. Filed May 4, 1933. No. 44, O. T. 1933.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

L. M. DAKIN (Successor to A. M. Anderson), as Receiver of the First National Bank of St. Petersburg,

PETITIONER,

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater,

RESPONDENT.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, L. M. Dakin, as Receiver of the First National Bank of St. Petersburg, by direction of the Comptroller of the Currency of the United States, respectfully submits his petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals from the Fifth Circuit in the

above entitled case of March 4, 1933. The Circuit Court of Appeals for the Fifth Circuit has affirmed the judgment of the District Court of the United States in and for the Southern District of Florida, Tampa Division. The matters involved are as follows:

The First National Bank of St. Petersburg acted as collecting agent in St. Petersburg, Florida, for Peoples Bank of Clearwater, of Clearwater, Florida, which forwarded checks on St. Petersburg banks deposited with it by its customers, and Peoples Bank of Clearwater acted as collecting agent in Clearwater for the First National Bank of St. Petersburg for checks on Clearwater banks. The First National Bank of St. Petersburg failed June 9, 1930, with collections in hand for Peoples Bank of Clearwater amounting to $2898.40. At the same time Peoples Bank of Clearwater held collections for First National Bank of St. Petersburg amounting to $2631.30. Peoples Bank of Clearwater retained this amount as a set-off against the collection made by the First National Bank of St. Petersburg.

A. M. Anderson, the former Receiver of the First National Bank of St. Petersburg, took the position that the collections made by the two banks belonged to their customers respectively and were not subject to set-off. Suit was brought by A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, against Peoples Bank of Clearwater, in the District Court of the United States in and for the Southern District of Florida, Tampa Division. The set-off was

pleaded. Subsequently the Peoples Bank of Clearwater became insolvent and was placed in the hands of Taver Bayly, as Liquidator, by the Comptroller of the State of Florida. Thereafter, judgment was entered in the District Court allowing the set-off and this judgment was affirmed by the Circuit Court of Appeals. A. M. Anderson resigned as Receiver of the First National Bank of St. Petersburg and your petitioner was duly appointed and qualified as Receiver to succeed the said A. M. Anderson, and is now acting as such.

The question presented to and decided by the District Court and affirmed in its opinion by the Circuit Court of Appeals of the Fifth Circuit was, that conceding the title of the checks sent to the First National Bank of St. Petersburg by Peoples Bank of Clearwater to be in its depositors, this was a matter of no concern to the Receiver of the First National Bank of St. Petersburg and the set-off should be allowed to Peoples Bank of Clearwater. The reasons why a writ of certiorari should be granted in this case are,

(a). The decision of the Circuit Court of Appeals is in conflict with the decision of (1) the Circuit Court of Appeals of the Eighth Circuit in the case of Hirning v. Federal Reserve Bank of Minneapolis, 52 Fed. (2d) 382; (2) the Circuit Court of Appeals of the Fourth Circuit in the case of Federal Reserve Bank of Richmond v. Early, 30 Fed. (2d) 198; (3) the Supreme Court of the United States in the case

of Early v. Federal Reserve Bank of Richmond, 281 U. S. 88.

(b). The decision is on an important question of general law and is in conflict with the weight of authority.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reviewed by this Honorable Court, and for such further relief as to this court may seem proper.

L. M. DAKIN,
Petitioner.

DONALD C. McMULLEN,
Counsel.

UNITED STATES OF AMERICA,
STATE OF FLORIDA,
COUNTY OF PINELLAS:

Before the undersigned authority personally ap-

peared L. M. Dakin, who, first being duly sworn, deposes and says, that he is the petitioner in the foregoing proceeding, that he has read the foregoing petition, and the same is true as he verily believes.

L. M. DAKIN.

Sworn to and subscribed before me this the 12th day of April, 1933.

SUSAN M. HALLOWELL,
Notary Public, State of Florida at Large.
My Commission expires Nov. 3, 1933.

SUPPORTING BRIEF.

The sole question to be determined in this case is, whether a forwarding bank can use the indebtedness due upon the checks of its depositors as a set-off against its collecting correspondent where the checks deposited do not become the property of the forwarding bank.

It is admitted in this instance that under the laws of Florida, Section 6834, Compiled General Laws, the title to the checks set off by Peoples Bank of Clearwater was in its depositors.

Federal Reserve Bank of Richmond v. Malloy, 264 U. S. 160.

Edwards v. Lewis, 98 Fla. 956; 124 So. 746.

City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2d) 562.

To permit Peoples Bank of Clearwater to use the checks forwarded for collection as a set-off enables it to secure payment in full for its customers, thereby giving such customers an unfair advantage to the detriment of other creditors of the insolvent First National Bank of St. Petersburg and contrary to the laws of the United States which contemplate a ratable distribution of the assets of banking associations organized under the laws of the United States.

U. C. Code, Title 12, Section 194.

Davis v. Elmira Savings Bank, 161 U. S. 27.

The use as a set-off of checks deposited for collection against a liability of the bank in which they were deposited was disapproved by the Circuit Court of Appeals of the Eighth Circuit in Hirning v. Federal Reserve Bank of Minneapolis, 52 Fed. (2d) 382. In Federal Reserve Bank of Richmond v. Early, 30 Fed. (2d) 198, the Circuit Court of Appeals of the Fourth Circuit said:

> "We do not think the Reserve Bank has the right to set off the balance due by the insolvent on the checks against its stock liability. . . . A set-off of checks held for collection against a liability would not be allowed for the reason, that demands to be set off against each other must be mutual; that is they must be due to and from the same parties and in the same capacity."

This decision was affirmed in Early v. Federal Reserve Bank of Richmond, 281 U. S. 88.

The same principle is enunciated in Bank of Metropolis v. New England Bank, 47 U. S. 212.

The weight of authority is that a set-off can not be sustained unless the party seeking to obtain the benefit of the set-off is the real owner and has the control of the counter claim.

McGraw v. Pettibone, 10 Mich. 530.

McDade v. Meade, 18 Ala. 214.

Olmstead v. Scutt, 55 Conn. 125.

Ryder v. Ellis, 241 Mass. 50.

McDonald v. Harrison, 12 Mo. 447.

34 C. J. 710-11.

Waterman on Set-Off, 2nd Ed., Sec. 59.

It is respectfully submitted that the writ of certiorari should issue.

DONALD C. McMULLEN,
Counsel.
Tampa, Florida.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 44

L. M. DAKIN (Successor to A. M. Anderson),
As Receiver of the First National Bank
of St. Petersburg, PETITIONER,

vs.

TAVER BAYLY, As Liquidator of the
Peoples Bank of Clearwater, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

DONALD C. McMULLEN,
Attorney for Petitioner.

F. G. AWALT,
GEORGE P. BARSE,
GEORGE B. SPRINGSTON,
Attorneys for Comptroller of the Currency,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 44

L. M. DAKIN (Successor to A. M. Anderson), As Receiver of the First National Bank of St. Petersburg, PETITIONER,

vs.

TAVER BAYLY, As Liquidator of the Peoples Bank of Clearwater, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.
OPINION AND JUDGMENT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Bryan, Circuit Judge) is reported in 63 F. (2) 592, and appears at page 20 in the record. The judgment of the United States District Court for the Southern District of Florida (Akerman, D. J.) is not reported, but appears in the record at page 16.

II.
JURISDICTION.

Writ of certiorari was granted May 29, 1933, (R. 23).

III.
STATEMENT OF THE CASE.

This action was brought by A. M. Anderson, as receiver of the First National Bank of St. Petersburg, Florida, in the District Court of the United States, Southern District (R. 1) against the Peoples Bank of Clearwater, Florida, to recover a balance of $2,631.30, representing funds collected by the Peoples Bank for the First National Bank. The defendant (Peoples Bank, respondent here) pleaded set-off based on four drafts drawn by the First National Bank of St. Petersburg in favor of the Peoples Bank, aggregating $2,898.20 which were unpaid by reason of the insolvency and suspension of the First National Bank of St. Petersburg. Plaintiff's replications alleged that the drafts were drawn in remittance for checks or drafts deposited with the Peoples Bank for collection and forwarded by the Peoples Bank to the First National Bank for collection. The respondent demurred to the replications (R. 10 and 15), the demurrer was sustained, resulting in a judgment for respondent (R. 16), which was affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 20). The petitioner, L. M. Dakin, was substituted for A. M. Anderson, the plaintiff in the District Court, appellant in the Circuit Court of Appeals, and now

seeks a review of the opinion and judgment of that court.

The facts in the case are not in dispute.

Prior to June 7, 1930, the First National Bank of St. Petersburg had forwarded two cash letters, in the respective amounts of $2,540.34 and $90.96, totalling $2,631.30, for collection and remittance, to the Peoples Bank of Clearwater, and on June 7, 1930, that bank had collected said sum of $2,631.30 and was indebted to the First National Bank of St. Petersburg in this amount.

On the same day the First National Bank of St. Petersburg was indebted to the Peoples Bank of Clearwater in the sum of $2,898.40, which the St. Petersburg bank had collected for the Clearwater bank under a collection and remittance agreement. The First National Bank attempted to remit payment to the Peoples Bank by drafts as follows:

June 4, 1930, draft for Three Hundred Forty-five and 69/100 Dollars ($345.69) on Chase National Bank of New York; June 5, 1930, draft for One Thousand Five Hundred Twelve and 62/100 Dollars ($1512.62) on Chase National Bank of New York; June 6, 1930, draft for Three Hundred Thirty-two and 21/100 Dollars ($332.21) on Chase National Bank of New York; and June 7, 1930, draft for Seven Hundred Seven and 88/100 Dollars ($707.88) on Chase National Bank of New York.

The First National Bank of St. Petersburg was closed and placed in the hands of a receiver, A. M.

Anderson, by the Comptroller of the Currency on June 9, 1930, at which time these drafts were outstanding and unpaid. The District Court allowed the set-off claimed by the Peoples Bank of Clearwater and entered judgment against the receiver of the First National Bank of St. Petersburg for the excess amount.

In affirming the judgment and allowing the set-off the Circuit Court of Appeals held that it was a matter of no concern to the appellant (Receiver—First National Bank—Petitioner here) whether the Clearwater bank held the items deposited by its customers for collection or for value, inasmuch as it had the right to maintain an action in its own name against the appellant for the amount due it, notwithstanding the fact that beneficial ownership in the items forwarded for collection, as a matter of law, vested in the forwarding bank's customers.

IV.

SPECIFICATION OF ERRORS.

(a) The Circuit Court of Appeals erred in holding that it was a matter of no concern to the receiver of the insolvent First National Bank of St. Petersburg, and his depositors-creditors, whether the Clearwater bank held the items deposited by its customers for collection or for value.

(b) The Circuit Court of Appeals erred in holding that the right to maintain a suit in the name of the Clearwater bank, irrespective of ownership of the items upon which the set-off was based, gave the

Clearwater bank the right to set-off, in a suit against it by the receiver of the St. Petersburg bank for the amount of the Clearwater bank's indebtedness to it.

(c) The Circuit Court of Appeals erred in holding that mutual debts were due to and from the Clearwater bank and the St. Petersburg Bank in the same capacity.

V.
ARGUMENT SUMMARIZED.

(1) The National Bank Act constitutes a complete code in itself governing the distribution of the assets of such failed banking associations, Cook County National Bank v. United States, 107 U. S. 445, and the Federal rule, which controls, United States v. Robeson, 9 Peters 319, 9 L. Ed. 142, (as it involves a matter of substantive law, The Gloria, 286 Fed. 188,) provides that distribution of the assets of an insolvent national bank must be made in accordance with Section 5236 U. S. R. S. (12 U. S. C., ch. 2, sec. 194) which requires a pro rata distribution of such assets to the bank's creditors.

(2) The requirement as to ratable dividends is to make them from what belongs to the bank, not what belongs of right to a debtor-depositor, hence where a set-off is otherwise valid its allowance cannot be considered a preference, Scott v. Armstrong, 146 U. S. 499; but where the set-off is not allowable by law its allowance effects a preference in the application of the bank's assets and defeats the mandate of the National Bank Act securing a ratable distribution of such assets among the bank's creditors.

(3) The right of set-off, non-existent at common law, was introduced and provided for by statute of 2 Geo. II, ch. 24, sec. 4, made permanent by the statute of 8 Geo. II, ch. 24, secs. 4 and 5, which enacted that where mutual debts exist between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484; North Chicago Rolling Mill Company v. St. Louis Ore and Steel Company, 152 U. S. 596. Most of the states of the United States have created the right of set-off by statute, and in Florida the right is governed by Section 4326, Compiled General Laws of Florida, 1927, providing for offset of mutual debts or demands existing between parties at the commencement of the action.

(4) The rule of law in set-off requires mutuality of parties and demand; these requirements contemplate mutuality of parties, Beauregard v. Case, 91 U. S. 134; mutuality of right, Gray v. Rollo, 18 Wall. 629; and mutuality in quality of right, Scammon v. Kimball, Assignee, 92 U. S. 362; Sawyer v. Hoag, 84 U. S. 610. The third requirement, mutuality in quality of right, in offset, is fundamental and is based on the sound legal question "to whom does the money or the claim actually belong, differently stated, is the party seeking to obtain the benefit of the offset the real owner of the claim". Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12; Gordon v. Union Trust Company, 308 Pa. 493; McGraw v. Pettibone, 10 Mich. 530. The claim of ownership must stand two tests: (1) Can plaintiff bring suit in his own name? (2) If so, would he be entitled to retain the

money or property recovered as his own? Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12; Olmstead v. Scutt, 55 Conn. 125; McGraw v. Pettibone, 10 Mich. 530. The right to set-off must exist at the moment of insolvency and suspension, for the rights of the parties are fixed as of that time. Scott v. Armstrong, 146 U. S. 499, Yardley v. Philler, 167 U. S. 344. McCandless v. Dyar, 34 Fed. (2) 989.

(5) It is a well settled rule of Federal law that, in the absence of a controlling statute or contract, the unrestricted endorsement of commercial paper deposited by a customer in a bank passes title to the paper, the bank becomes the owner of the paper, and the depositor the creditor of the bank, City of Douglas v. Federal Reserve Bank of Dallas, 271 U. S. 489, but here the relations of the parties are controlled by Section 6834, Compiled General Laws of Florida, 1927, which determined the rule of law governing the rights of the parties, under which rule the bank in which the items were deposited was a mere collecting agent for its customers, Federal Reserve Bank of Richmond v. Malloy Brothers, 264 U. S. 160, City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2) 681.

(6) By reason of this relationship it results that beneficial ownership of the items deposited remained in the forwarding bank's customers until collection of such items was made by the forwarding bank in cash or solvent credits, which result would have terminated the principal-agent relationship and established the relation of debtor-creditor, at which time title and ownership of the items would have passed to the bank, Commercial Bank of Pa. v. Armstrong, 148 U.

S. 50; Washington Loan & Banking Co. v. 4th Nat. Bank, 38 Fed. (2) 772. In the case at bar collection in cash or solvent credits never was effected by the forwarding bank, the agency relation of the Clearwater bank to its customers continued to exist down to the moment of insolvency and suspension of the St. Petersburg bank; the Clearwater bank held the remittance drafts as trustee for the beneficial owners, its depositors, in which situation mutuality in quality of right in offset did not exist, and the allowance of the set-off claimed would constitute an illegal preference of some of the creditors of the insolvent St. Petersburg bank over others in violation of the equal and ratable distribution rule provided for in the National Bank Act.

VI.

ARGUMENT.

A SET-OFF SHOULD NOT BE ALLOWED THE RESPONDENT, PEOPLES BANK OF CLEARWATER, BECAUSE BENEFICIAL OWNERSHIP OF THE ITEMS DEPOSITED WITH IT FOR COLLECTION AND CREDIT, AND LIKEWISE THE DRAFTS FORWARDED BY THE FIRST NATIONAL BANK OF ST. PETERSBURG IN REMITTING PAYMENT FOR SUCH COLLECTION ITEMS, REMAINED IN THE CLEARWATER BANK'S CUSTOMERS AND SO STOOD WHEN THE FIRST NATIONAL BANK SUSPENDED.

(1) *The rule governing the distribution of assets of an insolvent national bank stated.*

In Cook County National Bank v. United States, 107 U. S. 445, 448, the court said, in discussing the act authorizing the formation of national banks, that

> "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, . . . Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself."

As pointed out in Cook County National Bank v. United States, supra, after providing for the appointment of a receiver by the Comptroller of the Currency upon the suspension or failure of a national bank, the law requires the receiver to take possession of its books, records and assets, to collect all debts and claims belonging to it, to sell or compound bad or doubtful debts, and the real or personal property of the bank, upon an order of a court of competent jurisdiction, and, if necessary in order to pay its obligations, to enforce the individual liability of its shareholders. It requires the Comptroller, upon appointing a receiver to cause notice to be published, calling upon all persons having claims against the bank to present the same with legal proof thereof. It then declares in Section 5236 as follows:

> "Dividends on adjusted claims; distribution of assets. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller

shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)"

Then in Davis v. Elmira Savings Bank, 161 U. S. 275, 285, the court, referring to this section, said:

"In National Bank v. Colby, 21 Wall., 609, 613, 614, the court said:

"'As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. . . .

"'The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or "with the view to the preference of one creditor over another, except in the payment of its circulating notes," shall be utterly null and void.

"'There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment

of the notes, not only by requiring, in advance of their issue, a deposit of bonds of the United States, and by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

"'This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings.'"

Not withstanding Section 721 of the Revised Statutes of the United States (United States Code, Title 28, Section 725), which provides that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, it is submitted that the Federal courts are not bound by the decisions or statutes of the state courts on what constitutes the principles of substantive law but will follow the Federal precedents, or will determine what the general or fundamental law is for themselves, independent of state statutes and decisions. It has been so held in First National Bank of Shenandoah v. Liewer, 187 Fed. 16, 18:

"And it is the duty of the national courts to exercise their independent judgments in determining all questions of general commercial law, of general jurisprudence, and of right under the Constitution and laws of the United States. They are not controlled by the decisions of

state courts on questions of general commercial law. Railroad Company v. National Bank, 102 U. S. 14, 57, 26 L. Ed. 61."

The matter would appear to be concluded by the early decision of United States v. Robeson, 9 Peters, 319, 323, where the court said:

> "The first question which arises on these exceptions is, whether a claim which has been transferred to the defendant, forms a proper subject of set off, under the acts of congress, to a demand of the government. If this question shall be decided in the negative, it will not be necessary to inquire whether the claim in itself constitutes a proper item of set-off. It seems to have been presented to the proper accounting officer of the government as a credit, and that he refused to allow it. This is a question which arises, exclusively, under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government."

The foregoing statutes, decisions and discussion clearly establish three principles, (a) distribution of the assets of insolvent national banks must be made ratably among its creditors, (b) the right to set-off is a matter of substantive law, and (c) in its application by the Federal courts the Federal rule prevails.

(2) *The allowance of set-off as a preference discussed.*

There can be no question but that the National Bank Act definitely determines the obligations resting upon the Comptroller of the Currency with respect to the distribution of assets of an insolvent national bank. This Act, together with the pronouncements of this court construing it, of necessity, precludes a preference of one creditor over another. On the question as to whether or not a claim for offset may or may not be considered a claim for preference the statement of this court in Scott v. Armstrong, 146 U. S. 499, 510, is pertinent:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

It must be conceded that where the legal right to set-off exists its allowance cannot be considered a preference, but, conversely, where the set-off right does not exist as a matter of law it is clear that its allowance effects a preference in the application of the bank's assets, in that it takes moneys belonging to other depositors or creditors to effect a full 100% payment to the offset claimant, and operates to defeat the express mandate of the National Bank Act securing a ratable distribution of the bank's assets among its creditors. It is respectfully urged that the court had this principle in mind in National Bank v.

Colby, 21 Wall. 609, 614, and Davis v. Elmira Savings Bank, 161 U. S. 275, 285, when it said:

> "This design would be defeated (referring to the requirement for a ratable distribution of the bank's assets to its creditors) if a preference in the application of the assets could be obtained by adversary proceedings."

(3) *The right of set-off discussed.*

The right of set-off, non-existent at common law, was introduced and provided for by statute of 2. Geo. II, ch. 24, sec. 4, made permanent by the statute of 8 Geo. II, ch. 24, secs. 4 and 5, which enacted that where mutual debts exist between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484, North Chicago Rolling Mills Company v. St. Louis Ore and Steel Company, 152 U. S. 596. In the case of The Gloria, 286 Fed. 188, 192, 193, Circuit Judge Mack, concerning this aspect of the law, said:

> "With respect to the specific questions here to be decided, it must be remembered that the law of set-off and counterclaim is of relatively recent development. Recoupment only was known to the common law, and a restricted right of set-off first developed in equity. Even the limited right of set-off, properly so called, was never recognized at common law, but was introduced by the statute of 2 Geo. II, c. 22, sec. 13, made permanent by the statute of 8 Geo. II, c. 24, secs. 4 and 5 Cf. also earlier St. 4 and 5 Anne, c. 17, authorizing set-off in bankruptcy.

> The broader right of counterclaim and affirmative relief was an even more modern innovation. The right of counterclaim and set-off having been first introduced as a part of our procedural law, halting recognition is just beginning to be given to the fact that the right as between litigants is something more than a procedural convenience and is really a requirement of substantive justice. That the right of set-off and counterclaim is regarded in our law today as affecting, in important aspects, the substantive relations between the parties, is clearly seen in the rules as to the assignment of choses in action being subject to existing set-offs or counterclaims. It is interesting to note that in Roman law, too, the right of set-off was at first grudgingly recognized as part of the adjective law and only gradually accepted as a part of the substantive law. Girard, Manuel Elementaire de Droit Romain (4th Ed.), pp. 701-708; Buckland, A Text-Book of Roman Law, pp. 696-700."

Practically all of the states of the United States have created the right of set-off by statute, and in Florida, where this action arose, the right is governed by Section 4326, Compiled General Laws of Florida, 1927, which follows:

> "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set-off, and may be pleaded accordingly."

(4) ***The rule of law in set-off requiring mutuality of parties, mutuality of right, and mutuality in quality of right discussed.***

The court below considered that either bank had the right to plead set-off, if sued, because mutual debts were due to and from them in the same capacity, basing such conclusion on the premise that "since the Clearwater bank had the right to maintain a suit in its own name for the amount due it by appellant it had the right of set-off in a suit against it by appellant for the amount of its indebtedness to the St. Petersburg bank." The court thought it was a matter of no concern to the appellant (petitioner here) whether the Clearwater bank held the checks of its depositors for collection or for value. This presents the basic question as to whether or not the third requirement in set-off, mutuality in quality of right, is essential in determining the legal rights of the parties litigant. We seek to establish the doctrine announced by the lower court as erroneous, as a matter of law, and assert that this court, in Scammon v. Kimball, Assignee, 92 U.S. 362, 367, repudiates the lower court's rule and conclusively settles the prevailing law in the Federal courts:

> "Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. Adam's Eq., 6th Am. Ed., 447.
>
> "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off

> of debts accruing in different rights, except under very special circumstances, and where the proofs are clear and the equity is very strong. 2 Story's Eq., 6th Ed., sect. 1437 . . ."

The principles and rules we earnestly urge should be adopted and followed by this court are so well stated in Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12, that we quote in extenso from that case. The facts were that Thomas, Receiver of the Bank of Pittsburgh, N. A., brought suit against the Potter Title & Trust Company for $135,787.39, representing funds of the insolvent bank on deposit in the Potter Title & Trust Company at suspension of the Bank of Pittsburgh, N. A. The Title & Trust Company had on deposit in the Bank of Pittsburgh, N. A., an account designated "Potter Title and Trust Company Trust Account", and asserted the right to set-off. The court, reviewing fundamental principles of law, including the basic question of quality of right in set-off, presented in this action, said:

> "Is defendant entitled to the set-off claimed? What laws shall govern in the determination of this question, the laws of Pennsylvania or the laws of the United States? Rev. St. §721 (28 U. S. C. §725 ((28 USCA §725)) provides: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'
>
> "In Swift v. Tyson, 16 Pet. 1, 19, 10 L. Ed. 865, a leading case, the Supreme Court, in con-

struing the above act, said: 'And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.'

"In Gray v. Rollo, 85 U. S. (18 Wall.) 629, 632, 21 L. Ed. 927, the Supreme Court said: 'In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence, where he says: 'Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights'' . . .

"These rulings impliedly recognize that the

United States courts exercise an independent judgment on matters of set-off and do not follow the decisions of the state courts.

"If the determination of this question involves an interpretation of the national banking laws, which it seemingly does, then the United States law controls. In McCandless v. Dyar (D. C.) 34 F. (2d) 989, 991, defendant was indebted to a national bank. He set up as a defense thereto a claim in the nature of a set-off for money paid by him as a guarantor of the bank. The court said:

"'Has this defendant the right of set-off under the circumstances pleaded in this action, brought by the receiver upon his indebtedness to the bank? . . .

"'The right to the allowance of such an off-set in the case at bar must be determined in the light of the statutes of the United States controlling suspended national banks in the hands of a receiver appointed by the Comptroller of the Currency, and especially the provisions of the United States statutes prohibiting preferences in the liquidation of national banks.' . . .

"In the United States courts there must be mutuality of right before a set-off can be asserted."

After citing the excerpt from Scammon v. Kimball, Assignee, 92 U. S. 362, 367, we heretofore quoted in our brief, the court continued at page 14:

"In Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 S. Ct. 339, 49 L. Ed. 571, a bank-

rupt was indebted to the timber company. The timber company was indebted to the bankrupt as trustee. It was held the timber company could not set off the trustee debt against the individual debt.

"In United States v. Butterworth - Judson Corp'n et al., 267 U. S. 387, 395, 45 S. Ct. 338, 340, 69 L. Ed. 672, it is stated: 'A bank having notice that a deposit is held by one for the use of or as security for another has only such right of set-off as is not inconsistent with the rights of the latter.'

"The foregoing cases in principle rule that defendant cannot set off its deposit in the Bank of Pittsburgh, N. A., as trustee against the deposit of the Bank of Pittsburgh, N. A., with defendant in its own right.

"The principle laid down in the foregoing cases is the law of Pennsylvania. On June 27, 1932, the Supreme Court of Pennsylvania, in William D. Gordon v. Union Trust Company, 308 Pa. 493, 162 A. 293, 294, a case identical in principle and almost parallel in facts, speaking by Mr. Justice Kephart, said:

" 'The Commercial Trust Company deposited $6,429.50 with the Union Trust Company, the account being styled 'Commercial Trust Company Trust Funds'. The Union Trust Company had $6,808.45 on deposit with the Commercial Trust Company, this account being styled 'Union Trust Company Trust Funds'. It is conceded that both deposits represented trust funds of the respective institutions, and, as such, were the property of various cestuis que trust or beneficiaries of each bank.

" 'Union Trust Company was, and still is, a solvent going concern. Commercial passed into the hands of the secretary of banking because of impairment of capital. The secretary drew on Union for the trust funds of Commercial which it held. Payment of his draft was refused since Union claimed a set-off against it because of the trust fund deposit it had in Commercial. The court below refused to permit the set-off for the reason that it did not appear that there was mutuality of demand both as regards the quality of the right and the identity of the parties.

" 'The statutes and orders of the banking department have resulted in a general practice among trust companies of depositing trust funds exactly as was done in this case. The beneficial owners of Commercial's trust account are A, B, and C; their money is in the Union Bank. The beneficial owners of Union's trust account are X, Y, and Z, and their money is in the Commercial Bank. Strike the trust companies out of the picture, as they are only trustees holding legal title, and the matter is reduced to its simplest form. What is then asked in the set-off is that the money of A, B, and C, be used in part to pay the debts to X, Y, and Z. This we held in Hunter v. Henning, 259 Pa. 347, 103 A. 61, could not be done. Appellant attempts to limit that decision to its facts inasmuch as the trust accounts were there plainly earmarked, but as we said in Trestrail v. Johnson, 298 Pa. 388, 148 A. 493, 494: "Generally speaking, in all cases where the ownership of the fund itself has been in dispute, and not the right to administer it, the court has been particular to do nothing which would disturb in the slightest the fund reaching its des-

tined lawful end, without unnecessary risks that might come if a more liberal policy was adopted; it being conceded the fund was a trust or one that can be called such".

" 'The question here then is one of ownership, not one of determining the status of a deposit between the bank and the depositor. The underlying equitable principle set forth in Trestrail v. Johnson, supra, controls. *The names in which suit could be brought and defended furnish an indication, but are not the only criterion, of the right of set-off. To whom do the funds really belong? Mutuality of right in a set-off is not circumscribed by the 'right to bring an action', but the broader question may be, and generally is, of importance. Whose money or claim is proposed to be used as a set-off? This is the true equitable principle which governs such questions.* . . .

"If the deposit of the Potter Title & Trust Company in the Bank of Pittsburgh, N. A., had been of its own money, it would have been entitled, under the law, to set off the same against the deposit of the Bank of Pittsburgh, N. A., of its money in the Potter Title & Trust Company, although the result might be that the Potter Title & Trust Company would receive its entire deposit while other depositors of the Bank of Pittsburgh, N. A., might receive only a portion of their deposits. *But the deposit of the Potter Title & Trust Company in the Bank of Pittsburgh, N. A., was not of its own money, but it was of the money of other persons in which it had no interest other than as trustee or agent. Why should the deposit of such persons be paid in full when such payment may work a preference as against other*

> *depositors and creditors of the Bank of Pittsburgh, N. A.?* Such a result would be unjust, and is contrary to the decisions of the United States and Pennsylvania courts."

The general principle of mutuality in quality of right in offset is succintly expressed in Olmstead v. Scutt, 55 Conn. 125, 127:

> "One of the first and fundamental principles of set-off is, that the demand must be due the party in his own right, either as original creditor or as owner by assignment. The ownership must be such as to stand these two tests: 1st. Could he bring a suit in his own name as plaintiff? 2d. *If he could, would the avails recovered be for his own use, pleasure and benefit?* Parsons on Contracts, (5th Ed.) top page 737." (Italics ours).

Again adverting to the question of mutuality in quality of right, we believe this requirement is based on a sound legal question, "to whom does the money or the claim actually belong, or differently stated, is the party seeking to obtain the benefit of the offset the real owner of the claim?" The rule is previously, but well stated, in Olmstead v. Scutt, 55 Conn. 125, 127.

And, in an early case in Michigan, the Supreme Court of that state held, in McGraw v. Pettibone, 10 Mich. 530, 537;

> "It is a rule to which no case recognizes an exception—so far as we have been able to discover—that the party who seeks to obtain the

> benefit of a set-off, must be the real owner, and have the control of the counter claim, so that his creditor who sues him is his debtor as to the claim offered in reduction: 2 Pars. on Cont. 243."

It seems to us that the preferable rule, for which authority exists in both the Federal and state courts, Thomas v. Potter Title & Trust Company, supra; Gordon v. Union Trust Company, supra, and McGraw v. Pettibone, supra, is that a set-off cannot be sustained unless the party seeking to obtain the benefit of the set-off is the real owner of the claim, and is equitably entitled to the funds sued for, which he may use as his own. It would appear obvious that if mutuality in quality of right is an essential element in establishing the right to set-off then the conclusion of the lower court that it was a matter of no concern to the appellant that the Clearwater bank held the checks for its depositors for collection, or for value, was an erroneous premise, which led the court into error.

Before passing on to a discussion of the law respecting ownership of the items in question, it should be noted that the law of set-off also requires mutuality of parties. In Gray v. Rollo, 18 Wall. 629, 632, the court held:

> "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights."

And in Beauregard v. Case, 91 U. S. 134, 141, it was said:

> "That indebtedness was not compensated and extinguished by operation of law by the indebtedness at the time of the bank to May, if such existed. Personal debts are only set off to each other, or compensated the one by the other, by operation of law, when they are of the same personal character. A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties."

It is here urged that where ownership of the claim is shown in parties other than the defendant claiming the set-off right, thus establishing the lack of mutuality in quality of right for offset purposes, it follows as a matter of law, that mutuality of parties does not exist and on that ground the request for the allowance of set-off fails.

That the right to set-off must exist at the moment of insolvency and suspension, for the rights of the parties are fixed as of that time, is a proposition so well settled by repeated decisions of this court as not to need argument. Scott v. Armstrong, 146 U. S. 499, Yardley v. Philler, 167 U. S. 344, Davis v. Elmira Savings Bank, 161 U. S. 275.

(5) *The character of the contract, respecting ownership of the items deposited, discussed, in connection with the relation between the Clearwater bank and its depositors in the transaction.*

Proceeding upon the principle stated under Subdivision IV of the Argument, supra, that mutuality in quality of right is essential to the establishment of the legal right to set-off, and that, in determining the existence of this element the inquiry must be directed to the question of ownership of the items deposited, it is submitted that the relation between the Clearwater bank and its customers from the moment of the deposit of the items with the Clearwater bank to the date of suspension of the St. Petersburg bank was one of agency, under which relation the Clearwater bank was a mere collecting agent for its customers without any interest in, or title to, the items deposited.

Concerning the deposit of commercial paper in a bank the general rule is stated by this court in City of Douglas v. Federal Reserve Bank of Dallas, 270 U. S. 489, 70 L. Ed. 1051, 1053:

> "When paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes owner of the paper, and in making the collection is not the agent for the depositor. Burton v. United States, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rep. 243; . . ."

However, as stated in Federal Reserve Bank v. Malloy Brothers, 264 U. S. 160, 68 L. Ed. 617, the rule may, of course, be varied by contract, express or implied. At page 164, the court said:

> "Here the relations of the payee to the ini-

tial bank of deposit are controlled by the Florida statute with respect to which it must be presumed they dealt with each other."

With reference to a similar situation the United States Circuit Court of Appeals for the Fifth Circuit (involving the same insolvent national bank), in the recent case of City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2) 561, 562, stated:

> "It is held generally that a bank receiving items for collection and remittance is before collection the agent of the sender or the owner of the item, according to whether the New York or the Massachusetts rule applies. Marine Bank v. Fulton County Bank, 2 Wall. (69 U. S.) 252, 17 L. Ed. 785; Commercial Bank v. Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363. In these cases it was said that this relation of principal and agent continues after collection as to funds collected with the consequent duty of holding them for, and sending them to, the principal, unless there is an agreement as there was in those cases, express or implied, as to the funds after collection, raising the relation of debtor and creditor.
>
> "It is also the rule in those jurisdictions where the Massachusetts rule prevails that banks receiving items for collection may select the other banks to act as subagents for the owner of the item, and that these banks so selected, in the absence of other agreement, represented, not the forwarded, but the owner of the item. This is the rule in Florida by statute. Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A.L.R. 1261; Atlantic Nat. Bank v. Pratt, 95 Fla. 822,

116 So. 635; Edwards v. Lewis, 98 Fla. 956, 124 So. 746; Myers v. Federal Reserve Bank (Fla.) 134 So. 600."

The state rule is indicated by the following excerpt appearing in the case of Edwards v. Lewis, 98 Fla. 956:

> "In the case of Montsdoca v. Highlands Bank & Trust Company, 85 Fla. 158, 95 So. 666, 667, this court, in an opinion prepared by Mr. Justice Whitfield, stated that the statute above quoted makes the bank in which a check is deposited for deposit or collection liable only after actual final payment is received by it 'unless it is negligent in its duty according to the regular course of business of banks' and that the statute controls, and the decision in Brown v. Peoples Bank for Savings of St. Augustine; 59 Fla. 163, 52 So. 719, 52 L. R. A. (N. S.) 608, is not applicable. In other words, the statute has changed the rule so that now the relationship of the depositor of commercial paper with his bank of deposit, even though the deposit is not for collection, is in the nature of principal and agent, until such paper has been collected and payment actually received by the bank, in which event, the depositor becomes the creditor of his bank, the debtor."

The transaction in the case here presented is governed by Section 6834, Compiled General Laws of Florida, 1927, as follows:

> "When a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered

due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

Plaintiff's replications to defendant's IV, V, VI and VII pleas, (R. 7-10) and plaintiff's replication to defendant's III plea (R. 13-14) allege, and the demurrers thereto admit, that the checks or drafts which the Clearwater bank sought to set off against the St. Petersburg bank's claim were *"deposited with the defendant, Peoples Bank of Clearwater, for collection, which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg"*, for collection and remittance. Under Section 6834, as construed by this honorable court, by the United States Circuit Court of Appeals for the Fifth Circuit, and by the Supreme Court of Florida, *the title to the checks or drafts sought to be made the basis of a plea of set-off by the Clearwater bk. was unquestionably in the customers of that bank,* and not in the bank at the time the St. Petersburg bank closed.

It is conceded that the right to set-off exists in the Clearwater bank's customers in the event these customers' indebtedness to the St. Petersburg bank is affirmatively established, and this conclusion, in itself, negatives the existence of a right to set-off in the Clearwater bank.

(6) *The right to set-off discussed, where beneficial ownership of the claim vests, not in the Clearwater bank, but in its depositors.*

(a) We consider the reasoning adopted and the doctrine established by the court below is expressly refuted by the United States Circuit Court of Appeals for the Fourth Circuit in Federal Reserve Bank of Richmond v. Early, 30 Fed. (2) 198, where this identical question was presented. The court, in discussing the fundamental principle here involved, said:

> "On the second question, we do not think that the Reserve Bank has the right to set off the balance due by the insolvent bank on the checks against its stock liability. The Reserve Bank was not the owner of these checks. It was merely an agent for collection, and, although it credited them to the accounts of the forwarding banks this was upon agreement that they might be charged back, if not collected, and the second lot of checks has been charged back. . . . It is perfectly clear that the liability of the insolvent member bank for these checks is a liability owing to the owners of the checks, in which the Reserve Bank is not interested, except as collection agent, and is not "a debt of the insolvent member bank to the Federal Reserve Bank," within the meaning of the statute.

> "Even in the absence of a statutory direction as to how the liability should be applied, a set-off of checks held for collection against such a liability would not be allowed, for the reason that demands to be set off against each other must be mutual; that is, they must be due to and from the same parties and in the same capacity."

It is respectfully urged that the correct rule of law governing the transaction here presented is that the Clearwater bank was the collecting agent for its customers of the items deposited by reason of the Florida statute, which controls, and, by reason of this relationship, it results that beneficial ownership of such items remained in the bank's customers until collection thereof was made by the Clearwater bank in cash or solvent credits; and, inasmuch as this result never occurred, the agency relation of the bank continued to exist down to the moment of insolvency and suspension of the St. Petersburg bank, at which time the Clearwater bank held the remittance drafts as trustee for the beneficial owners of the items, its depositors, *in which situation neither mutuality in quality of right nor mutuality in parties for offset purposes existed, and the allowance of the set-off claimed would constitute an illegal preference to the Clearwater bank's customers over other creditors of the insolvent St. Petersburg bank,* in direct violation of the ratable distribution rule required by the National Bank Act.

ANALYSIS OF CASES SEEMINGLY CONTRARY TO CONTENTIONS HERE MADE BY PETITIONER.

Nomland v. First National Bank of Kansas City, Mo., 64 Fed. (2) 399.

Harry Nomland, Receiver of the State Bank of Stockton, Kansas, brought suit against the First National Bank of Kansas City, Mo., for $1,460.94 upon the following facts: "The Kansas City bank mailed a cash letter to the Stockton bank containing checks amounting to $1,460.94 drawn upon the latter bank by certain of its depositors, which checks the Kansas City bank had received from its own depositors, and had given such depositors credit upon their respective accounts, the deposit being made under the usual form of deposit slip used by the Kansas City bank, which provided that items deposited may be handled as the customer's agent, that the bank as agent, or owner, is not liable for negligence, default or failure of other banks selected as agents or subagents or for losses in transit with the right to charge back until actual cash payment is received. On November 12, 1927, the Stockton bank received said checks from the Kansas City bank, charged them to the respective accounts of its depositors, who had issued them, and mailed, on that day, a cash letter to the Kansas City bank containing a draft for $1,460.94 drawn by the Stockton bank on the Kansas City bank in remittance for said checks, and debited its own account with the Kansas City bank with that amount. On that date, and prior to the time of drawing the draft, the Stockton bank had to its credit with the Kansas City bank the sum of $3,592.62. On Monday morning, November 14, 1927, the Kansas City bank received the cash letter and the draft from the Stockton bank but be-

fore it had made any entry or record of the receipt of the draft the Kansas City bank received a telegram from the national bank examiner in charge advising it that the Stockton bank had closed and to withhold payment on all outstanding drafts. The Stockton bank did not open for business on November 14, 1927. The reasoning of the court follows: That assuming mutuality of debtor-creditor relation is a prerequisite to the right of set-off, the answer to the question as to the set-off right existing depends upon ownership of the checks transmitted from the Kansas bank to the Stockton bank; that the unrestricted endorsement of the checks by the Kansas bank's customers passed title to the Kansas bank; that the deposit contract did not create an agency relation, and since the Kansas bank was the owner of the checks the moment the Stockton bank collected them by simply making proper entries on its books, there arose between the Stockton bank and the Kansas City bank the mutual relation of debtor - creditor and the right of set-off arose in favor of the Kansas bank, which was not defeated by the subsequent insolvency and suspension on the part of the Stockton bank.

While we do not concede that the deposit contract there under consideration did not represent a special agreement controlling ownership of the items deposited, St. Louis, etc. Railway v. Johnston, 133 U. S. 566, we assert that the basic principle for which we now contend was there decided in our favor, following Hirning v. Federal Reserve Bank, 52 Fed. (2) 382, to the effect that the relationship of the parties determines the right to set-off, hence where ownership of

the items, under a collection agreement, is established in the bank's customers, set-off is not available, but where ownership is shown to be in the bank set-off is available. In order to find for the Kansas bank the court found it necessary to determine ownership of the items in that bank, and having reached this conclusion we agree that the right to set-off followed. As a matter of law it will be noted that had the court reached a different conclusion on the question of ownership a contrary result would have followed, in order for the court to be consistent. Bosworth v. Continental Illinois Bank & Trust Company, 65 Fed. (2) 632. (Petition for certiorari now pending in this court.)

In this case the receiver of the McCartney National Bank of Green Bay, Wisconsin, brought suit to recover its credit balance in the Continental Illinois Bank & Trust Company and the latter bank pleaded its right to set-off, against such deposit balance, a draft in the sum of $10,823.14 issued by the McCartney National Bank on the Federal Reserve Bank of Chicago in favor of the Continental Illinois Bank & Trust Company, which failed payment by reason of the closing of the national bank. The draft represented attempted payment for checks drawn on the McCartney National Bank, which had been deposited in the Continental bank under an agency contract, and forwarded by the Continental bank to the McCartney bank for collection and remittance. In allowing the set-off the Circuit Court of Appeals for the Seventh Circuit followed A. M. Anderson, Receiver, v. Taver Bayly, 63 Fed. (2) 592 (the case

now under consideration), and Nomland, Receiver v. First National Bank of Kansas City, 64 Fed. (2) 399. The court held that these two cases dealt with somewhat similar fact situations and were favorable to the Continental Bank. In view of the fact that certiorari has been granted in the first case, and is now being argued on the precise question involved in the McCartney - Continental case, and that in the Nomland-First National Bank case ownership of the items was determined in favor of the Kansas bank, it is denied that these cases are authority for the decision reached by the Circuit Court of Appeals for the Seventh Circuit, and it is respectfully submitted, for the reasons set forth in the pending case, that the court there reached an erroneous conclusion as a matter of law.

THE FACT THAT THE ST. PETERSBURG BANK HAD FORWARDED ITS DRAFT IN PAYMENT OF THE CASH LETTER DISCUSSED.

Inasmuch as the drafts forwarded by the St. Petersburg bank were not paid the relation between that bank and the Clearwater bank was not changed, for under the agency contract the Clearwater bank's customers were entitled to get what their bank had received at the moment of the insolvency and suspension of the St. Petersburg bank, or, in other words, the beneficial owners of the items deposited for collection and credit then became the beneficial owners of the drafts, upon which they or the bank as their agent, may prove their claim against the assets of the insolvent bank in the hands of the Comptroller's receiver. It thus results that they are remitted to the

general funds, unless they are able to prove the elements essential to the allowance of a preferred claim, trust relationship, augmentation and tracing, on the authority of Larabee Flour Mills v. First National Bank of Henryetta, 13 Fed. (2) 330, certiorari denied, 47 Sup. Ct. 238, U. S. 727, Blakey v. Brinson, 286 U. S. 254, 76 L. Ed. 1089, Hirning v. Federal Reserve Bank, 52 Fed. (2) 382, Empire State Surety Company v. Carroll County, 194 Fed. 593, Mark v. Westlin, 48 Fed. (2) 609, Mac Donnell v. Guy, 63 Fed. (2) 334, Schilling v. Rowe, 64 Fed. (2) 188, Beard v. Independent District of Pella City, 88 Fed. 375. Collection having been effected by a transfer of credits on the books of the St. Petersburg bank the settled Federal rule classifies the claims of the Clearwater bank's customers as general only.

ANALAGOUS PRINCIPLES OF LAW, REPRESENTING QUASI FIDUCIARY RELATIONSHIPS IN OFFSET, DISCUSSED.

It is difficult to understand why the principles of law in the case now under consideration are different, when considering the rule of law governing set-offs, from the settled rule of law firmly established in both Federal and state courts in this country in quasi fiduciary relationships. It would seem clear that, since the Clearwater bank held the items deposited, and the draft remitted in payment thereof, under an agency relation, the Clearwater bank was a trustee for the beneficial owners, its customers, and, as such, is in no other or different relation, in applying the rule of law in set-off, from any other person holding property in a fiduciary capacity.

The principle governing set-off in cases involving fiduciary funds was first established in Wilson v. Codman's Executor, 3 Cranch 193, 203, in this colloquy between counsel and the court, during argument:

> "Simms, Counsel — No set-off against the trustee can be set up against the cestui que trust. The authorities cited in Winch and Keely can be produced, if the court should require it.
>
> "Marshall, Ch. J. — There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot offset, against the debt due from him to the principal, claims against the agent. It cannot be contested."

Then, in Hanover National Bank v. Suddath, 215 U. S. 122, the court held that where a bank, after refusing to discount paper sent to it by the insolvent while a going concern, for that purpose, has retained the paper, it cannot, as against general creditors, set off against that paper or its proceeds, the bankrupt's overdraft, although made after such refusal and pending the retention of the paper. This holding by the court was restated in the case of In Re G. F. Redmond & Company, Inc., 17 Fed. (2) 501, 502:

> "The contention of the trustees relative to this right of set-off is based on a well settled doctrine that a simple debt cannot be set off against a quasi fiduciary obligation, such as Ginsburg owed the bankrupt corporation. Western Tie & Timber Co. v. Brown, 196 U. S.

502, 25 S. Ct. 339, 49 L. Ed. 571; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Hanover Nat. Bank v. Suddath, 215 U. S. 122, 30 Sup. Ct. 63, 54 L. Ed. 120."

And in an early Federal District Court case, The Zouave, 29 Fed. 296, 298, the rule is stated:

> "To authorize a set-off the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated . . . And by the civil law it was necessary that the debt or claim, to be compensated, should be certain and determinate, and actually due, and in the same right and of the same kind as that on the other side. Story, Eq. Jur. Sec. 1441."

The principle that a simple debt cannot be set off against a quasi fiduciary obligation has been repeatedly followed in state cases, and it applies to executors, see Dale v. Cooke, 4 Johns. Ch. (N. Y.) 11, 16, where Chancellor Kent says:

> "Here was an application to set off a debt arising on a contract with an executor, against a debt arising on a contract with a testator. They are not debts due to and from the same persons, in the same capacity, and there is no mutuality."

which holding was followed by Starke v. Myers, 53 N. Y. S. 650, 651, to the effect that:

> "It is well settled that claims against an executor or administrator individually cannot be offset against claims in his favor in a representative capacity as trustee for the estate."

and the case of Laighton et al., Executors, v. Brookline Trust Company, 225 Mass., 458, at page 460, 114 N. E. 671, where it was held:

> "We think that the right to set-off is limited to the balance of the deposit as it existed at the time of the testator's death. It could not successfully be contended that if, upon the appointment of the plaintiffs as executors, they had opened a new account and made deposits therein, the defendant could have set off its claim against such account . . . To hold otherwise would permit the defendant to obtain an inequitable preference which would be unjust to other creditors."

The rule is applicable to trustees, see Harris v. Elliott et al., 48 N. Y. S. 1020, 1021, where the court stated:

> "It is clear, as a matter of law, that the plaintiff cannot, as against the beneficiaries of a fund which he holds in trust, offset a personal claim; or, to express it differently, a trustee cannot set off his personal claims against a beneficiary so as to avoid payment of a balance due by him as trustee."

Likewise, in Ellis v. Baker-Matthews Lumber Company, 248 S. W. 7, 10, it was determined that:

> "A trustee cannot set off against the trust indebtedness an independent debt due him individually. The trustee is not a debtor. Therefore, any debt owing by him or due to him individually is not due in the same right or capacity as a trustee, and lacks mutuality."

and in Kaye v. Metz, 198 Pac. 1047, 1049, where the court, in denying set-off to creditors of an insolvent corporation for their claims against their unpaid holdings in the corporation, said:

> "A creditor stockholder would thus obtain a preference. In order to warrant a set-off," the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." 19 Cyc. 894. The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors."

A similar result was reached in Mahon v. Harney County National Bank, 206 P. 224, 227:

> "There is no right of set-off against a trustee depositor. Sanford v. Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394; Cent. National Bank v. Conn. Mut. L. Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724. In order to counterclaim, the debt must be between the same parties and the same right."

and the general rule is announced by the Supreme Court of Massachusetts in Bates v. Cosmopolitan Trust Co., 133 N. E. 758, 760:

> "Except under special circumstances and where the proofs are clear and the equity very strong, equity, following the law, will not allow a set-off in different rights than is allowed by the enacted statutes of set-off. Jump v. Leon,

192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Perry v. Pye, 215 Mass. 403, 102 N. E. 653; Scammon v. Kimball, 92 U. S. 362, 367, 23 L. Ed. 483."

It is seriously contended that no essential difference exists between persons holding funds in a fiduciary capacity, such as executors, administrators, trustees, guardians and public officers, and a bank holding funds or property of its customers or depositors under a trust relationship created through an agency contract. We believe this court so indicated in Hanover Nat. Bk. v. Suddath, 215 U. S. 122, where it declined to sanction a set-off of credit instruments held in trust against the insolvent bank's indebtedness to the holder of the discount paper which the Hanover Bank had refused to discount. To enforce any other rule would, of necessity, create a preference to the detriment of the general creditors of the insolvent bank.

CONCLUSION.

It is respectfully submitted that the foregoing discussion discloses that the right to set-off does not exist in the present case; that the Clearwater bank was not the beneficial owner of the items deposited by its customers, or the remittance drafts forwarded in payment thereof; that neither mutuality in quality of right nor of parties exists in this case, and that the allowance of set-off contravenes the ratable distribution section of the National Bank Act; that the lower court's ruling is in direct conflict with fundamental principles of law controlling decisions of the

Federal courts; and that an affirmance of the lower court's decision will, in effect, overrule the settled law in this country respecting the allowance of set-off in the Federal courts, and adversely affect the interests of creditors of about two thousand national banks now in the hands of the Comptroller of the Currency and his receivers.

It is respectfully submitted that the decision of the lower court should be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 44.

L. M. DAKIN (SUCCESSOR TO A. M. ANDERSON), AS RECEIVER OF THE FIRST NATIONAL BANK OF ST. PETERSBURG,
Petitioner,

vs.

TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF.

Your petitioner has heretofore approached the discussion of this case in his brief on the principle that the record discloses, on the face of the pleadings, that the indebtedness of the First National Bank of St. Petersburg to the Peoples Bank of Clearwater was an indebtedness owing to it as agent for its customers, inasmuch as the replication alleged that the items deposited with the Clearwater Bank by its customers were deposited for collection, which statement of fact is necessarily admitted by respondent's demurrer. (R. pp. 7, 8, 9, and 10.) These facts, supported by the record as indicated, were the basis for petitioner's

argument that items held under an agency relation, as distinguished from the relation of debtor-creditor, were not the proper subject of set-off. It now appears that a major portion of the brief of respondent discusses the question upon the theory that the Peoples Bank had accepted the drafts as payment and were liable to their customers under the doctrine established in Federal Reserve Bank v. Malloy, 264 U. S. 160.

This is a clear departure from the position of the respondent urged upon and sustained by the District Court and the Circuit Court of Appeals, and it was upon this record and this issue that petition for certiorari was asked of this Court. It is respectfully urged that the right to set-off on the basis of virtual ownership by reason of the alleged acceptance of the drafts as payment and alleged liability of the Clearwater Bank to its customers, for negligence under the Malloy case, not having been raised in the Court below, nor presented by the record, is not now properly before this Court for argument or determination.

We consider it a complete answer to the contention now made by respondent that, inasmuch as both banks are in receivership today, the customers of the Clearwater Bank have the option to elect whether they will proceed against the Clearwater Bank, under the doctrine announced in Federal Reserve Bank v. Malloy, 264 U. S. 160, upon the principle of liability for negligence, or against the National Bank by reason of their beneficial ownership of the collection items, in consequence of which they are entitled to follow such beneficial ownership into the drafts representing the collection items.

A careful reading of the Malloy Brothers case discloses by analogy that the Clearwater Bank could be liable to its customers only to the extent of the loss sustained through negligence in accepting drafts in lieu of cash or solvent credits. The customers of the Clearwater Bank not having made an election as to the remedy they will pursue, it follows that the liability of the Clearwater Bank upon the

theory of negligence has not yet been determined, and therefore the alleged consequent ownership of the Clearwater Bank in the drafts has not accrued or been determined. In this situation, assuming for discussion only, that potential liability under the Malloy doctrine does exist against the Clearwater Bank on behalf of its customers, the recourse of the Clearwater Bank against the St. Petersburg Bank would, of necessity, be by subrogation only to the rights of the customers of the Clearwater Bank against the National Bank upon the drafts in question. Such right of subrogation, not having at this date been fixed or determined, must necessarily arise, if at all, subsequent to the suspension of the National Bank, and as pointed out in Yardley v. Philler, 167 U. S. 344 and Scott v. Armstrong, 146 U. S. 499, such claim cannot be the subject of set-off, in view of the well-settled principle that the right to set-off is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created, and that claims acquired by assignment, purchase or subrogation after the appointment of a receiver are not a proper subject of set-off. McCandless v. Dyar, 34 Fed. (2) 989.

Respecting the contention of the respondent that the drafts were accepted by respondent as payment and that consequently respondent owned said drafts in its proprietary capacity and not as agent, we believe that Peoples National Bank v. Moore, 25 Fed. (2) 599, 601, is in point, wherein the Court holds that a draft accepted for collection items is not payment unless there is an express agreement that it is received as payment or unless there is clear and satisfactory proof of the intention that it is so received. There is nothing in the record in this case to indicate an express agreement that this draft was accepted as payment by the Clearwater Bank, nor that there was any intention that it would be accepted by that bank as final payment. Consequently it must be presumed from the record, as a matter of law, that the drafts were not accepted in payment

and that payment was not intended to result until the proceeds of the drafts had actually been received.

Respondent also contends that to allow the claim of the petitioner, without set-off, would not only require the Clearwater Bank to pay the National Bank receiver in full, but would also permit the Clearwater Bank to receive only dividends from the National Bank. This contention is not tenable, inasmuch as the suit of the National Bank receiver against the Clearwater Bank, likewise in liquidation, will have no other effect than to establish a claim against the Clearwater Bank (Merrill v. First National Bank of Jacksonville, 75 Fed. 148, 153; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 402), upon which it will pay dividends to the St. Petersburg Bank as in the case of any other creditor of that bank. It results that the situation, in reality, will be that each bank will be entitled to and *will receive dividends* as follows: the Clearwater Bank, on behalf of its customers, to receive dividends from the St. Petersburg Bank, and the National Bank, in its own right (or on behalf of its customers as subsequent facts not here material may develop), to receive dividends on its claim against the Clearwater Bank. In this connection we desire to advise the Court that the statement on page 3 of petitioner's brief to the effect that "On the same day the First National Bank of St. Petersburg was indebted to the Peoples Bank of Clearwater", was intended to be stated: "On the same day the First National Bank of St. Petersburg was indebted to the customers of the Peoples Bank of Clearwater".

Respondent urges at page 7 of his brief that petitioner ultimately finds himself in the same identical position as respondent, and upon this theory reasons that the transaction establishes mutuality of parties. While this argument of respondent is not based upon facts disclosed by the record, the argument persuades us that the right to set-off would be still further removed from respondent if there were a *lack of beneficial ownership of the items with*

respect to both banks. (Thomas vs. Potter Title and Trust Co., 2 Fed. Supp. 12.) While the general rule of set-off indicates that mutual obligations between the same parties may be offset, the principle we now urge to this Court, and for which we expressly contend, is that the mutuality required must depend upon beneficial ownership of the obligations in question. We believe this Court so held in Central National Bank v. Connecticut Mutual Life Insurance Company, 104 U. S. 54, where the Court said at page 66:

> "But although the relation between the Bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account."

In conclusion your petitioner asserts that this offset should not be allowed for the reason that its allowance would effect an illegal preference in the application of the bank's assets, defeating the ratable distribution rule of the National Bank Act, for while it is conceded that where a legal right to set-off exists its allowance cannot be considered a preference, it cannot be doubted that the allowance of an illegal set-off constitutes an unlawful preference in that it improperly diminishes the trust fund of the general creditors by application of a portion thereof to effect the set-off claimed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. [redacted] 44

L. M. DAKIN (Successor to A. M. Anderson), as Receiver of the First National Bank of St. Petersburg, Petitioner.

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater, Respondent.

Brief of Respondent, Taver Bayly, as Liquidator of The Peoples Bank of Clearwater, Florida

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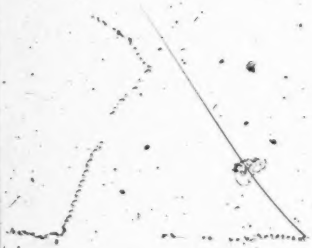

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 930

L. M. DAKIN (Successor to A. M. Anderson), as Receiver of the First National Bank of St. Petersburg, Petitioner,

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater, Respondent.

Brief of Respondent, Taver Bayly, as Liquidator of The Peoples Bank of Clearwater, Florida

---

Comes now Taver Bayly, as Liquidator of the Peoples Bank of Clearwater, Florida, Respondent, and respectfully submits this his brief, in opposition to the petition for writ of certiorari heretofore filed by the petitioner, L. M. Dakin, Receiver of the First National Bank of St. Petersburg, Florida, in the above entitled cause.

Statement of Facts

The First National Bank of St. Petersburg acted as collecting agent in St. Petersburg, Florida, for the Peopes Bank of Clearwater, Florida, and the Peoples Bank of Clearwater in turn acted as collecting agent for the First National Bank of St. Petersburg in the same manner and in the same way that the St.Petersburg bank in turn acted for the Clearwater bank. On June 9, 1930, the First National Bank of St. Petersburg failed. At the time of its failure, the St. Petersburg bank *had collected and held in its vaults* funds for the Peoples Bank of Clearwater amounting to $2,898.40. Prior to the date of its failure, the First National Bank of St. Petersburg had attempted to remit these funds to the Peoples Bank of Clearwater, Florida, by issuing to the Peoples Bank a series of drafts drawn on the Chase National Bank of New York. The First National Bank of St. Petersburg closed before the Peoples Bank, acting in due course, had made collection of these drafts. At the same time the Peoples Bank of Clearwater had collected for the First National Bank of St. Petersburg the aggregate amount of $2,631.30. The Peoples Bank of Clearwater retained this amount as a set-off against the collection made by the First National Bank of St. Petersburg. While this suit was in progress in the District Court,

the Peoples Bank of Clearwater also became insolvent and the Respondent was named by the Comptroller of the State of Florida as liquidator. The Petitioner, as Receiver of the First National Bank of St. Petersburg, Florida, in a dual capacity represents the depositors and the First National Bank of St. Petersburg, and in a like capacity the Respondent represents the depositors and the Peoples Bank of Clearwater.

Argument

The Circuit Court of Appeals of the Fifth Circuit, in affirming the judgment of the District Court allowing the Respondent a set-off, held that Section 6834 of the Compiled General Laws of Florida (which section does nothing more than define the liability of a bank of deposit to its depositors for diligence in making a collection of a check or draft deposited with it) must of necessity be construed with Section 6810 of the Compiled General Laws of Florida, both of said sections being a part of the Florida Negotiable Instruments Law; Section 6810 providing that

> "The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course, discharges the instrument."

In construing the above statutes, the Respondent earnestly submits that it was of no concern to the Petitioner whether the Clearwater bank

obtained the checks for which the Petitioner remitted its drafts from its depositors for collection or for value. See McCullough vs. Driggs, 35 Fla. 277, 17 So. 407; Brown vs. First National Bank, 86 Fla. 198, 97 So. 351. We respectfully call attention to the able opinion rendered by the Circuit Court of Appeals of the Fifth Circuit, which is found beginning at the bottom of page 30 of the Transcript of Record. We also call attention to the fact that this opinion was rendered by a unanimous decision of the Honorable Judges of said Court.

We call attention to Section 4326 of the Compiled General Laws of Florida which sets forth the right under the laws of Florida for a defendant to set-off the mutual indebtedness against the plaintiff. See also the following cases in which both Federal and Florida Courts have approved set-off between an insolvent bank and a defendant:

Camp v. First National Bank, 44 Fla. 497; 33 So. 241.

Scammon v. Armstrong, 92 U. S. 362; 23 L. Ed. 483.

Scott v. Armstrong, 146 U. S. 499; 36 L. Ed. 1059.

Durkee v. National Bank of State of Florida, 42 C. C. A. 674; 102 Fed. 845.

George D. Harter Bank of Canton, Ohio v. Inglis, 6 F (2nd) 841.

Hardley v. Clothier, 2 C. C. A. 349; 51 Fed. 506.

Hockway v. First National Bank, 36 F. (2nd) 166.

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16 Rose's Note, 2nd, Ed. Page 191, Anno. to the case of Scott v. Armstrong, Supra.

Beal v. National Exchange Bank, 5 C. C. A. 304; 55 Fed. 894.

Wyman v. Fort Dearborn National Bank, of Chicago, 181 Ill. 279; 48 L. R. A. 565.

Niblick v. Park National Bank, 169 Ill. 520; 39 L. R. A. 160.

Prudential Realty Company v. Allen, 241 Mass. 277; 25 A. L. R. 935 and Note.

Gerseta Corporation v. Equitable Trust Co. 241 N. E. 418; 43 A. L. R. 1320.

This Honorable Court in the case of Scott vs. Armstrong, 146 U. S. 499, defined the Rule of set-off to be

> "Where the mutual obligations have grown out of the same transaction, insolvency on the one hand justify the set-off of the debt on the other."

On page 3 of the forcible and enlightening brief of the Comptroller of the Currency, as Amicus Curiae herein, we find the following

pertinent statement:

> "For a period of years it has been the understanding of the Comptroller of the Currency, that only such demands as were mutual at the time of an insolvent national bank's suspension, that is, beneficially owned by the same parties in the same right, can be made the basis of set-off."

The Respondent respectfully submits that the Circuit Court of Appeals in this case decided that the pleadings herein revealed the identical question of mutuality which the learned counsel says is the basis of set-off.

The pleadings in this case reveal that regardless of the capacity in which the Respondent claimed an indebtedness against the Petitioner, that the Petitioner finds himself in the same identical position with the Respondent, thus conclusively showing mutuality.

This Respondent respectfully submits that the question decided in this case by the Circuit Court of Appeals of the Fifth Circuit is not in conflict with the weight of authority, inasmuch as the principles and rules governing the right of set-off have long been adhered to by this Honorable Court; that the Circuit Court of Appeals in this case has merely correctly applied those general provisions of law which this Court so ably laid down in the case of Scott vs. Armstrong, Supra. The Respondent suggests that it

would be of no material benefit to the Comptroller of the Currency or to the various Federal bank receivers to have this Court again reiterate the law on the question of set-off, inasmuch as the Circuit Court of Appeals in this case has correctly interpreted said law.

The Respondent respectfully shows that the opinion in this case as handed down by the Circuit Court of Appeals of the Fifth Circuit, is in no wise in conflict with the opinion in the case of Federal Reserve Bank of Richmond vs. Early, 30 Fed. (2nd) 198, and is in no wise in conflict with the Circuit Court of Appeals of the Eighth Circuit in the case of Hirning vs. Federal Reserve Bank of Minneapolis, 52 Fed. (2nd) 382, nor is said decision in conflict with the decision of this Honorable Court in the case of Early vs. Federal Reserve Bank of Richmond, 281 U. S. 88, inasmuch as in all of the above cases the element of mutuality is lacking, while in this case the element of mutuality between the parties is clear and definite.

The Respondent further suggests that the question of preferment of creditors is not raised by the pleadings, and is not an issue in this case, but it is purely a legal question of set-off.

WHEREFORE it is respectfully submitted that the petition for the writ of certiorari should by this Honorable Court be denied.

THOMAS HAMILTON,
Attorney for Respondent.

MELVIN A. McMULLEN,
CHESTER B. McMULLEN,
CYRIL E. POGUE,
Of Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1933

NO. 44

L. M. DAKIN (Successor to A. M. Anderson),
As Receiver of the First National Bank
of St. Petersburg, Petitioner,

vs.

TAVER BAYLY, As Liquidator of the
Peoples Bank of Clearwater, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT.

THOMAS HAMILTON,
Attorney for Respondent.

MELVIN A. McMULLEN,
CHESTER B. McMULLEN,
CYRIL E. POGUE,
GEORGE M. POWELL,
Of Counsel for Respondent.

TURNER PRINTING COMPANY, CLEARWATER, FLORIDA

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L. M. DAKIN (Successor to A. M. Anderson),
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ON WRIT OF CERTIORARI TO THE UNITED
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MELVIN A. McMULLEN,
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Of Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1933

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L. M. DAKIN (Successor to A. M. Anderson),
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vs.

TAVER BAYLY, As Liquidator of the
Peoples Bank of Clearwater, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT.

I

OPINION AND JUDGMENT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Bryan, Circuit Judge) is reported in 63 F. (2) 592, and appears at page 20 in the record. The judgment of the United States District Court for the Southern District of Florida (Akerman, D. J.) is not reported, but appears in the record at page 16.

II.

JURISDICTION.

Writ of certiorari was granted May 29, 1933, (R. 23).

III.

STATEMENT OF THE CASE

We agree with counsel for the Petitioner that the statement of the case as contained in Petitioner's Brief is a fair and accurate statement of the case.

ARGUMENT

A SET-OFF SHOULD BE ALLOWED THE RESPONDENT, TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER, BECAUSE THE DRAFTS UPON WHICH JUDGMENT WAS RECOVERED IN THE DISTRICT COURT AND AFFIRMED BY THE CIRCUIT COURT OF APPEALS WERE MADE PAYABLE TO PEOPLES BANK OF CLEARWATER FOR A VALUABLE CONSIDERATION, AND BECAUSE THE PEOPLES BANK WAS ENTITLED TO SET OFF THE AMOUNTS OF THE DRAFTS AT THE TIME OF THE INSOLVENCY OF THE FIRST NATIONAL BANK OF ST. PETERSBURG.

(1) *The Uniform Negotiable Instruments Law discussed with reference to Section 6834 of the Compiled General Laws of Florida.*

It is necessary at the outset, in determining the rights of the parties to this suit, that the Court bear in mind that Section 6810 of the Compiled General Laws of Florida, which law was written into the Statutes of the State of Florida because of the Uniform Negotiable Instruments Law existing in practically all of the States in the Union, and which placed the State of Florida upon a uniform basis with the other States of the Union with reference to the handling, collection and payment of negotiable paper. The Section referred to is as follows:

> "The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument."

We sincerely urge that this Court keep clearly in mind that the Respondent here is attempting to set off certain drafts issued to it and made payable to it by the Petitioner at the time the petitioning Bank was solvent. Copies of the drafts attempted to be set off are shown on pages (5, 6 and 7 T of R.) By referring to the drafts in question the Court will note that each draft is unequivocally made payable to the order of Peoples Bank of Clearwater; that each draft is drawn on the Chase National Bank in New York; that each draft is endorsed without restriction by the Peoples Bank of Clearwater. It is alleged in the pleas (T of R 3, 4, 5) that said drafts were issued to the Peoples Bank for value and that said drafts were duly endorsed and presented for payment but the same were dishonored and refused because of the insolvency of Petitoner. It is admitted in the Brief of the Petitioner that a set-off in this case would be proper except for the fact of Section 6834 of the Compiled General Laws of Florida, which is as follows:

> "When a check, draft, note or other negotiable instrument is deposited in a Bank for credit or for collection, it shall be considered due diligence on the part of the Bank in the collection of any check, draft, note or other negotiable instrument so deposited to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor, or surety of any check, draft, note or other negotiable instrument so deposited shall be liable to the Bank until actual final payment is received, and when a Bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

It is sincerely urged by the Respondent that the Statute just above quoted is not a statute defining the ownership of negotiable paper in transit, but it is a Statute defining negligence on the part of a Bank, and the resulting liability of the Bank to its depositor when such negligence is established. A reading of the Statute itself clearly shows that the intention of the Legislature, when the Statute was enacted, was to define due diligence on the part of a forwarding bank, for the reason that the Statute itself sets forth the time, the manner and the method of accounting between the Bank and its depositors. It makes no attempt to nullify or to amend Section 6810 which defines the rights of holders of negotiable paper. It is the contention of the Respondent, that by virtue of Section 6810 of the Compiled General Laws of Florida, that the acceptance of checks from its depositors, as alleged in plaintiff's replication, (T of R 7, 8, 9, 10), which

checks were endorsed by the depositors, unqualifiedly and unrestrictedly, vested, in the Respondent, a right to enforce collection of the said checks in any legal manner it desired; that this Court should, in construing the applicability of Section 6834 of the Compiled General Laws, also keep in mind the rights that resulted to the Respondent by reason of the unrestricted endorsements; that in the enforcement of one section of the negotiable instruments law, that this Court must, if possible, give full faith and credit to other sections of the negotiable instruments law and must not ignore one section in order to enforce the provisions contained in the other section, unless such sections are of course conflicting and not capable of being reconciled.

The Supreme Court of Florida, in the case fo McCallum and Greeley vs. Driggs, 35 Fla. 277, 17 So. 407, at an early date defined the rights of a holder of a negotiable instrument to sue:

> "The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer or endorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is prima facie sufficient evidence of his right to sue and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of mala fides. And, as has been said in Maryland courts: 'Courts will never inquire whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless in an allegation of mala fides, and the blank endorsement may be filled up at the moment of trial'."

Still later the Supreme Court of Florida in Brown vs. First National Bank of Panama City, 86 Fla. 198; 97 So. 351; clearly set forth the rights of a bank to paper which it held in due course.

> "The endorsement of the checks was unrestricted, and their endorsement and delivery gave the bank the legal title. By an almost unbroken line of decisions, this confers a right to sue thereon, even though the endorsee is in fact an endorsee for collection only. Such an endorsee is the real party in interest within the meaning of the Code. In such a case, courts will never inquire whether a plaintiff sues for himself or as trustee for another nor into the right of possession unless in an allegation of mala fides. 2 Daniel Neg. Inst. 1191."
>
> Citizens State Bank vs. Tessman & Co. 121 Minn. 34; 140 N. W. 178; 45 L. R. A. (NS) 606.

It thus follows as a logical conclusion that at the time the drafts were issued to the appellee and before the insolvency of the appellant, that the appellee could have maintained an action at law in the Florida courts against the appellant on the items herein sought to be set off, and that the Courts would not have permitted the appellant to defend on the theory which they are now using to attempt to defeat a set-off.

(2) *Elements of set-off discussed.*

The Petitioner, beginning with page 15 of his Brief, discusses very ably the fundamental requirements as to the

right of set-off. We agree that to entitle a Respondent to set-off certainly there must be a mutuality of parties coupled with a mutuality of right. We do not concede that it is a fundamental prerequisite that there must appear a mutuality in quality of right as the term mutuality of right is broad enough to cover mutuality in quality of right. However, in the instant case, we thing it is clear that there is a mutuality in quality of right as defined by the Petitioner. As to mutuality of parties, we only say that the pleadings disclose that at the time of the insolvency of the St. Petersburg Bank that said Bank was indebted to the Peoples Bank of Clearwater by reason of the issuance of its drafts; that the Clearwater Bank was indebted to the St. Petersburg Bank for moneys collected. The Petitioner attempts to show that the indebtedness of each Bank to the other was in a different capacity. We, therefore, call your attention to a reading of the pleadings (T of R 1 to. 10), which disclose that regardless of the position or regardless of the capacity in which Petitioner would have this Court place the Respondent, that in turn the Petitioner ultimately finds himself in the identical same position, for the reason that the indebtedness of each party one to the other arose out of the fact that each Bank had selected the other Bank as its correspondent; that each Bank had forwarded to the other Bank cash letters for collection and remittance drawn upon its own depositors; that each Bank had charged to the account of its various depositors the cash letters so forwarded to it; that each Bank had attempted to remit to the other for the cash letters so collected and had been prevented from doing so by the insolvency of the St. Petersburg Bank. We cannot conceive of a transaction between two parties more conclusively showing mutuality of parties than the transaction in this case as disclosed by the pleadings.

In a well reasoned case, the Supreme Court of Arkansas, when a Federal Reserve Bank filed a bill in equity to impress a trust upon funds of an insolvent bank for the amount of items sent by the reserve bank to the insolvent bank for collection, the defendant receiver raised the question of the right of the reserve bank to maintain the bill upon the ground that the items were deposited with the reserve bank for collection. The objection was disposed of in the following language:

> "We think, however, that the Reserve Bank had the right to sue. The Reserve Bank had been constituted the agent of the owners, and was the legal holder of the various items, all of which had been accepted and an abortive attempt had been made to pay. The agency was not discharged until the purpose of the agency had been accomplished, which was to make the collection and to remit the proceeds."

Rainwater v. Federal Reserve Bank, ——— Ark. ———; 290 S. W. 69, 71.

Since it is well settled that before insolvency the appellee could have maintained their suit against the appellant, upon the cause of action set forth in the pleas of set-off, we will now examine cases pertinent to the right of set-off generally.

The right of a bank to set off the matured indebtedness of an insolvent bank against claims of the insolvent bank against it are universally recognized. Both Federal and Florida Courts have approved such set-offs.

Camp v. First National Bank,
44 Fla. 497; —— So. ——.

Scammon v. Armstrong,
92 U. S. 362; 23 L. Ed. 483.

Scott v. Armstrong,
136 U. S. 499; 36 L. Ed. 1059.

Durkee v. National Bank of State of Florida,
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George D. Harter Bank of Canton, Ohio v. Inglis
6 F (2nd) 841.

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16 Rose's Note, 2nd. Ed. Page 191,
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Prudential Realty Company v. Allen,
241 Mass. 277; 25 A. L. R. 935 and Note.

Gerseta Corporation v. Equitable Trust Co.
241 N. W. 418; 43 A. L. R. 1320.

The Supreme Court of the United States in the case of Scott vs. Armstrong, 136 C. S. 499, defines the rule of set-off to be:

> "Where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt on the other."

Upon the precise point of mutuality the above decision is also conclusive, as the following quotation shows (Page 1062 of the Opinion).

> "In the case at Bar the credits between the banks were reciprocal and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credits, and the principle applicable to mutual credits applied. It was, therefore, the balance upon an adjustment of the accounts which was the debt, and the Farmers' Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of that bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary. Wheth-

er this was so or not is the question on which the opinion of the district judge turned, and which was chiefly urged in argument upon our attention."

The plaintiff has dwelt at length at the argument and in his brief with reference to the distinction between the so-called Massachusetts and New York rule and we admit that Florida has adhered to the Massachusetts rule. We have found two cases which we think are precisely in point with this case; one from Pennsylvania and one from Montana, both of which states are committed to the Massachusetts rule.

Action was brought by the assignee of the Penn Bank against the Farmers Deposit National Bank to recover the sum of Twenty-three Thousand Two Hundred Eighteen and 59 / 100 ($23,218.59) Dollars, with interest, being the amount claimed to have been left on deposit by the Penn Bank with the defendant. The defense was payment and set-off. The set-off consisted of a Cashier's check for Eighty-eight Thousand ($88,000.00) Dollars, issued by the Penn Bank to the Germania Savings Bank, and deposited by the latter with the defendant. The defendant presented the check to the Penn Bank, but payment was refused. The Penn Bank thereafter closed its doors and made an assignment to one Henry Warner. The defendant charged back against the account of Germania Savings Bank the full amount of the cashier's check, but did not return the check. No other question was involved other than the right of the defendant to use the cashier's check as a set-off against the action brought to recover the deposit balance belonging to the Penn Bank. In reversing the lower court, the Supreme Court held:

"It is not denied that at the time of the failure of the Penn Bank and its assignment to Henry Warner for the benefit of creditors, the Farmers' Deposit Bank (defendant below) was the lawful holder of the check of the said Penn Bank for $88,000.00, and that it was such holder at the time of the trial below in a suit brought by assignee of the Penn Bank against the said Farmers' Deposit Bank to recover a balance of $23,218.59, admittedly due the Penn Bank at the time of its failure, the Farmers' Deposit Bank attempted to use the check of $88,000.00 as a set-off. The Court below instructed the jury that the latter bank could not so use it. This is the one error of the case and it runs all through it.

"The theory of this ruling was that the check belonged to the Germania Savings Bank and a large amount of time was wasted in trying this unimportant fact. Of what possible concern was it to the Penn Bank whether the defendant held it for collection or for value? It had no reference to the check in the hands of either bank. If there had been a defense as to the Germania Bank then the Penn Bank might have called upon the defendant to show that it had paid value. But as the case stood--with no defense as to either bank--it had no standing to inquire into the relations between the defendant and the Germania any more than if the check had been presented at its counter and payment demanded before its insolvency. If we concede that the defendant was a mere collecting bank, so far as this check was concerned, it does not alter the

case. As such its title was sufficient to maintain a suit in its own name.

"If it could maintain a suit on this check in its own name, it is difficult to see any good reason why it could not set the check off in a suit against it by the assignee of the Penn Bank. The rights of the assignee rise no higher than those of its assignor. Neither the Penn Bank nor its assigns have any concern with the question of the ownership of the check unless a defense be shown as against the Germania, or that the defendant became the holder after the assignment. As no defense was set up against the check in the hands of anyone and as it is an undisputed fact that the defendant became the lawful holder thereof several days before the assignment, we are all of opinion that the set-off should have been allowed."

Farmers Deposit Nat. Bank vs. Penn Bank
123 Pa. 283; 16 A. 761; 2 L. R. A. 273.

So we say what difference could it possibly make whether this defendant acquired the drafts in question as agent of its depositor or whether it owns the real and beneficial interest in said drafts. It occurs to us that the hairline distinction attempted to be set up by the plaintiff is merely a play upon words and should not receive serious consideration.

In a Montana case, the case of Clarke, Receiver, vs. National Bank of Montana, —— Mont. ——, 252 Pac. 373, decided in 1926, involves a similar state of facts. On May 19, 1924, Peoples Store of Manhattan was indebted to

Davidson Grocery Company, of Butte, Montana, in the sum of One Hundred Seventy-four and 15/100 ($174.15) Dollars, and on that date drew its check in favor of the Grocery Company on Home State Bank of Manhattan. The Grocery Company deposited this check in Metals Bank & Trust Company, of Butte, for collection. The latter forwarded the check to the defendant for collection and credit. The drawee bank having an account with the defendant, the latter credited the Metals Bank and charged the account of the Manhattan Bank with the amount of the check. On May 23, the defendant forwarded the check to the Manhattan Bank, which the latter failed to pay, having closed its doors on May 25. Thereupon the defendant reversed its entries, but upon insistence by the Metals Bank that the check had been accepted by failure of the Manhattan Bank to return the item within twenty-four hours, credit was again given the Metals Bank. By inference it appears all the credit balance due the Manhattan Bank from defendant was thereafter paid except the amount above mentioned represented by the check in dispute. This action was by the receiver of the Manhattan Bank to recover such balance. The defense was payment. After first ruling that the failure of the Manhattan Bank to return the check within twenty-four hours was an acceptance under the N. I. L., the court affirmed the judgment for the defendant, holding:

> "By this acceptance the Manhattan Bank became primarily liable for the amount of the check to the defendant as endorsee of the Davidson Grocery Company, 2%. C. L. 1144."
>
> "Upon the liability this created, the defendant could have maintained an action against the Man-

hattan Bank, and having paid the check by crediting the Butte Bank with the amount thereof, was entitled to set up such payment as a complete defense to the plaintiff's action."

In view of the above authorities as applied to the pleadings in this case, we cannot conceive of any question as to mutuality of accounts, and mutuality of parties. As the pleadings show, both appellant bank and appellee bank were engaged in the banking business in Florida for years prior to the insolvency of each of them. For a good many years the First National Bank of St. Petersburg remitted checks drawn on the Peoples Bank and other banks of Clearwater to the Peoples Bank for collection. Upon collections being made by the Peoples Bank, it in turn remitted its draft to the First National Bank. The Peoples Bank in turn forwarded to the First National Bank checks drawn by its depositors on said bank for collection and remittance, and the First National Bank collected and remitted by draft. Each bank used the same method in making the collection and each bank remitted to the other in the identical manner by draft. It so happened that the First National Bank of St. Petersburg became insolvent first. It now happens that both banks are being represented by a receiver and a liquidator. It is also clearly shown by the pleadings that the Peoples Bank was the agent of the First National Bank and the First National Bank in turn was the agent of the Peoples Bank. This brings us to the second point raised by the appellant in his brief.

(3) *Does a forwarding bank which forwards cash letters to a correspondent bank for collection and remittance, after the collecting bank has collected the items and remitted*

by draft, which draft is accepted by the forwarding bank as payment for the cash letters forwarded but which draft is not paid, acquire such an interest in the draft or in the debt represented by said draft as to permit the forwarding bank to use said draft as a set-off against a debt or obligation owed by the forwarding bank to the collecting bank?

It is undisputed between the parties to this suit and it is clearly revealed by the pleadings that the drafts which the Respondent herein is seeking to set off were forwarded to it by the First National Bank of St. Petersburg for moneys actually collected by the St. Petersburg Bank for the Peoples Bank of Clearwater. It is the contention of the Respondent that when the First National Bank of St. Petersburg actually collected the money represented by the cash letters forwarded the St. Petersburg Bank and charged back to the accounts of its own depositors, the checks forwarded to it, marked the checks paid, and returned the checks to its depositors, and then executed its draft to the Peoples Bank of Clearwater, and that later said drafts were accepted by the Peoples Bank as revealed by the pleas (T of R 3, 4, 5) that the legal effect of the acceptance by said Peoples Bank, of the drafts, constituted legal payment and that in this manner, the drafts were so accepted that payment had been received as fully as if cash money had been received, as far as the relationship between the Peoples Bank and its customers were concerned, for the reason that under Section 6834 of the Compiled General Laws of Florida, the Statute upon which the Petitioner relies in support of his theory that the Peoples Bank never at any time owned any interest in the drafts, the Peoples Bank had a right to receive as payment anything which it might have, in its own opinion, decided was payment. In other words, the forwarding Bank had the option and the

right to choose what, in its opinion, constituted payment; that under the section above set forth, the acceptance of the draft, upon which there is no question, changed the relation between the Peoples Bank and its depositors from the relation of trustee for its depositors or from the relation of principal and agent, if such relationship ever in fact existed, to a relationship purely of debtor and creditor. It is conceded throughout the Brief of the Petitioner that if it be shown that the relationship of debtor and creditor existed between the Peoples Bank and its depositors at the time of the insolvency of the First National Bank, then ownership of the draft cannot be questioned, and certainly the defense of set-off would be available to the Respondent. We respectfully, but sincerely, insist that at the time of the insolvency of the First National Bank, that the relation of debtor and creditor existed between the Peoples Bank and its depositors by reason of the fact that the Peoples Bank had accepted as payment the drafts of the First National Bank and also by reason of the provisions of Section 6810 of the Compiled General Laws of Florida.

In the case of Federal Reserve Bank vs. Malloy, 264 U. S. 160; 31 A. L. R. 1266; this Court held as follows:

> "Acceptance of the draft by the Richmond Bank as payment of the Malloy check, had the effect of releasing the drawer and therefore materially altering the relationships of the parties. Technically there resulted a transfer of the drawer's funds and his right of action against the drawee bank; and previous rights and obligations between the owners of the check and the drawer were superseded. It follows, this result having been brought about by the

> unauthorized act of the Richmond Bank standing in that transaction in the relation of agent to the owners of the check, that such owners are entitled to recover from the Richmond Bank for the loss which they sustained unless the case falls within some exception to the general rule."

The above case, decided by this Court, clearly holds that the acceptance of the drafts mentioned, by the Peoples Bank positively and unequivocally changed the relationship between all of the parties to the extent that the Peoples Bank's own depositors would have the right to sue the said Bank for moneys collected by it for its depositors. In other words, will this Court now, after the forceful and enlightening opinion in Federal Reserve Bank vs. Malloy, Supra, listen to the contention of the petitioner that the Peoples Bank owns no interest in the drafts attempted to be set off and at the same time hold that the acceptance of the draft amounted to payment within the terms of Section 6834 of the Compiled General Laws.

The presenting of a check for payment implies that the holder desires, and is ready and willing, to accept payment. Simpson v. Pacific Mut. L. Ins. Co. 44 Cal. 139; Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (N. S.) 1167, 83 Pac. 1048. If the holder of a check procures it to be accepted or certified, the drawer and all indorsers are dicharged from liability thereon. Comp. Laws 1913, Paragraph 7072; Negotiable Instruments Law, Paragraph 188. If the holder or his collecting agent presents the check for payment, and the drawer has funds on deposit to meet it, which the drawee is then ready and willing to deliver, the contract of the drawer is fulfilled. 5 R. C. L. p. 498. If the holder, in-

stead of receiving money, causes the check to be deposited to the credit of his account in the drawee bank, the check is paid and the drawer released from liability thereon. Burton v. United States, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rept. 243; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766. And, if the holder, in lieu of money, accepts a draft from the drawee bank, such acceptance amounts to payment, and he takes the draft at his own risk, and not at the risk of the drawer of the check. Simpson v. Pacific Mut. L. Ins. Co. supra; Anderson v. Gill, 79 Md. 312, 25 L. R. A. 200, 47 Am. St. Rep. 402, 29 Atl. 527; Comer v. Dufour, 95 Ga. 376, 30 L. R. A. 300, 51 Am. St. Rep. 89, 22 S. E. 543; Loth v. Mothner, 53 Ark. 116, 13 S. W. 594; 2 Morse, Banks & Bkg. 5th Ed. Paragraph 426; Dan. Neg. Inst. Paragraph 1591.

(4) *The First National Bank of St. Petersburg, as a matter of law, is estopped to deny that the Peoples Bank of Clearwater is the owner of the drafts forwarded it.*

It is the Respondent's contention that the Petitioner cannot in good conscience deny that the Peoples Bank is the owner of the drafts forwarded it by the First National Bank of St. Petersburg for the reason that the First National Bank accepted the cash letters and checks forwarded to it by the Peoples Bank; It is admitted by all parties concerned that the First National Bank of St. Petersburg received the money which these checks and these items represented; It is conceded that the moneys were attempted to be paid to the Peoples Bank of Clearwater. These actual physical facts negative the idea that the First National Bank of St. Petersburg was responsible to the depositors of the Peoples Bank rather than to the Peoples Bank itself. Should the Court

sustain the contention of the Petitioner, we would have an unusual situation, and the liquidator of the Peoples Bank would find himself in this position: He would be forced to pay in cash all of the moneys collected by the Peoples Bank for the depositors of the First National Bank. At the same time he cannot charge back against the accounts of the depositors of the Peoples Bank moneys collected by the First National Bank on the cash letters forwarded to it by the Peoples Bank for the reason that it has accepted payment of said items by accepting the drafts; Federal Reserve Bank vs. Malloy, Supra. He cannot recover from the original makers of the checks for the reason that the First National Bank of St. Petersburg has marked them "paid", has debited the accounts of its depositors with the items represented by the checks and has cancelled and returned the checks to them. In other words, to sustain the Petitioner's position, this Court must hold that the Petitioner can recover all of the money owing to it by the Respondent and at the same time can retain in its vaults all sums of money which it has collected and owes to the respondent. We think for this reason clearly the Petitioner is estopped to deny that the ownership of the drafts is vested in the Respondent.

REBUTTAL

In rebuttal to the excellent and enlightening brief of the petitioner, we will only call the Court's attention to a few of the major contentions. As to the question of mutuality, we feel that we have discussed this thoroughly. We agree with the cases cited in the Petitioner's Brief as to the fundamental law on the question of mutuality and set-off. We think that the facts as revealed by the pleadings in the instant case clearly show every essential element necessary to show

mutuality of parties and of subject matter to entitle the defendant to a set-off. We do not think that the question of preference as raised by the Brief is proper to be discussed by either the Petitioner or the Respondent as the Respondent herein is not seeking in a court of equity to establish a preferred claim, but that the sole issue to be decided is purely a legal question of set-off. On the question of preference, the Petitioner very ably makes this statement on page 13 of his Brief:

> "It must be conceded that where the legal right to set-off exists, its allowance cannot be considered a preference."

We think this statement by the Petitioner is enough to convince the Court that the question of preference has not been raised by the pleadings in this cause.

The Petitioner relies very strongly on Thomas vs. Potter Title & Trust Company, 2 Fed. Supp. 12. We have read this case thoroughly and we cannot see nor do we concede that it is applicable to the facts in the instant case, as the Potter Title & Trust Company case is clearly based on the trust fund doctrine and decides the question of whether or not a trustee can set off his trust funds in payment of a purely personal obligation. The Court, very properly, in this case held that there was not mutuality of parties nor of subject matter. Consequently there was no legal basis for a set-off. We think that this case is good law, but we can not concede that it adds any weight to the petitioner's contention in the instant case for the reason that the facts are entirely different.

We respectfully call attention to the inconsistent positions which the Petitioner herein is requesting this Court to

take in deciding the case at bar. At the outset the Petitioner takes the position that the Florida Statute with reference to set-off, being Section 4326, Compiled General Laws of Florida,

> "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects to set-off and may be pleaded accordingly"

should be ignored by this Court. We cannot concede that the Petitioner is correct in this for the reason that the Brief fails to enlighten the Respondent in what manner or in what way the above quoted statute is in conflict with any statute of the United States or with the Constitution of the United States. In the same breath, the Petitioner strongly urges that the set-off should be denied by reason of Section 6834 of the Compiled General Laws of Florida, which section, it is urged, controls the ownership of the drafts. We sincerely urge that should the Court ignore any of the Florida Statutes with reference to set-off, it should ignore both statutes. Should this Court take the position that neither statute is applicable, then there is no question as to the defendant's right of set-off for the reason that the ownership of the drafts is clearly vested in this Respondent. See City of Douglas vs. Federal Reserve Bank of Dallas, 271 U. S. 489, 70 L. Ed. 1051:

> "When paper is endorsed without restriction by a depositor and is at once passed to his credit by the Bank to which he delivers it, he becomes the creditor of the Bank, the Bank becomes owner of the

paper and in making the collection is not the agent for the depositor. Burton v. U. S. 196, U. S. 283, 49 L. Ed. 482."

In other words we do not see how this Court in passing upon the questions raised in this cause, can apply some of the provisions of the Florida Statutes and ignore other provisions bearing upon the subject. We believe that this judgment will be affirmed if this Court will bear in mind all of the statutory provisions of Florida which are pertinent, and we also believe that the judgment will be affirmed should the Court ignore all of the provisions of the Florida Statutes which are pertinent.

RECENT CASES DECIDED BY THE UNITED STATES CIRCUIT COURTS OF APPEAL OF THE SEVERAL CIRCUITS.

At this point we respectfully call to the attention of the Court cases which have within the past twelve months been decided by the Circuit Courts of Appeal on the identical question involved in this cause.

Nomland vs. First National Bank of Kansas City, Mo.

64 Fed. (2) 399.

In this case the Court held that the Uniform Negotiable Instruments Statute applied, and that a contract between the bank and its customer, which contract was set forth on the deposit slip and which was very nearly identical with Section 6834 of the Compiled General Laws of Florida, must of necessity be construed with reference to the Uniform Negotiable Instruments Law and that an unrestricted endorsement of the checks passed title to the Bank, and further held

that the Kansas Bank was the owner of the checks the moment the Stockton Bank collected them by simply making proper entries on their books. There arose between the Stockton Bank and the Kansas City Bank the mutual relation of debtor and creditor and consequently the right of set-off.

In the case of Bosworth, Receiver of the McCartney Nat'l Bk. of Green Bay, Wisconsin, vs. Continental Illinois Bank and Trust Company, 65 Fed. (2), 632, the Circuit Court of the Seventh Circuit in an opinion decided by Circuit Judge Evans decided the identical question now presented to this Court in the instant case; that in the opinion the Circuit Court used the instant case and the case of Nomland, Receiver, vs. First National Bank of Kansas City, Supra, as the legal basis for arriving at his decision. We therefore call attention to the fact that the case now presented to this Court has been presented to three of the Circuit Courts of Appeal, all within the past eighteen months; that in each instance the Circuit Courts of Appeal have decided favorably to the contentions of the Respondent here; that in each instance the law and the facts before the Courts are very nearly identical with the case at Bar.

CONCLUSION

In conclusion we call attention to the concluding paragraph of the opinion affirming the judgment in the instant case written by Circuit Judge Bryan (T of R 22)

> "In this case all the checks sent by each Bank to the other had been paid in full, and as a result the drawers of the checks had been discharged. It was no longer possible for either bank to return to

its depositors the checks which it had received from them. Each bank was the debtor in the same capacity that it was creditor. One was no more an agent than the other. If the Clearwater bank did not have the right to sue neither did appellant. In our opinion either Bank had the right to sue or to plead set-off if sued, because mutual debts were due to and from them in the same capacity. 24 R. C. L. 858. The judgment is affirmed."

We, therefore, respectfully submit that there is both mutuality in parties and subject matter as defined by the cases herein cited, and that the allowance of a set-off by this Court will not conflict with the prior rulings of this Court, but on the other hand will be in accordance with and conformity to the previous rulings of this Court and of the Courts of Last Resort of the several States, and that it will not adversely affect the interest of creditors of thousands of National banks, but on the other hand will lead to a uniform and orderly liquidation of those unfortunate banks which are now in the hands of the Comptroller of the Currency and his receivers.

It is respectfully submitted that the decision of the Lower Court should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted]44

L. M. DAKIN (SUCCESSOR TO A. M. ANDERSON), AS RECEIVER OF THE FIRST NATIONAL BANK OF ST. PETERSBURG, FLORIDA, PETITIONER,

vs.

TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER, FLORIDA, RESPONDENT.

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for F. G. Awalt, Acting Comptroller of the Currency.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 930

L. M. DAKIN (SUCCESSOR TO A. M. ANDERSON), AS RECEIVER OF THE FIRST NATIONAL BANK OF ST. PETERSBURG, FLORIDA, PETITIONER,

vs.

TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER, FLORIDA, RESPONDENT.

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ.

Comes now F. G. Awalt, Acting Comptroller of the Currency of the United States, and respectfully submits his brief, as *amicus curiæ*, in support of the petition for writ of certiorari filed by L. M. Dakin (Successor to A. M. Anderson), Receiver of the First National Bank of St. Petersburg, Florida, in the above entitled cause.

I.

Foreword.

Citation of the opinions below, statement concerning the jurisdiction of the court to issue writ of certiorari, summary of the facts, specification of errors, and argument of the issues involved, have been fully covered in the record, petition and supporting brief filed by the Receiver of the First National Bank of St. Petersburg, Florida, and therefore reference is here made to the same in the interest of avoiding repetition.

II.

Interest of the Comptroller of the Currency in the Case from an Administrative Standpoint.

The Comptroller of the Currency is charged by law with the liquidation of insolvent national banks (through receivers appointed by him), and with the disbursement of the net proceeds of such liquidation to the creditors of such banks. More than one thousand national banks are now in the hands of receivers appointed by the Comptroller of the Currency. An additional thousand national banks are in the hands of conservators appointed by the Comptroller of the Currency, pursuant to the provisions of the Bank Conservation Act, passed at the present session of Congress, to be reorganized or liquidated. Before disbursement can be made it is necessary that the creditor, whether general or preferred, establish or prove his claim. An important function of the Comptroller

in this respect is to pass upon and allow or reject the claims sought to be established. (Sections 5234, 5235, 5236 U. S. R. S.; U. S. C., Ch. 2, Title 12, Sections 192, 193, 194.)

The instant case involves a set-off question which frequently arises incident to the reconcilement of an insolvent national bank's accounts with correspondent banks, and therefore directly affects the administrative functions of the Comptroller with reference to national banks now in receivership or in conservatorship, as well as those which, in the future, may go into receivership or conservatorship.

Obviously it is necessary, in order to avoid discrimination, that a uniform policy be pursued with reference to set-off to effect the pro rata distribution among creditors provided by law. Hundreds, and sometimes thousands, of set-off questions arise incident to the liquidation of each insolvent national bank. The last consideration of set-off questions with reference to such banks by this Honorable Court was on December 12, 1892, in the case of *Scott* v. *Armstrong*, 146 U. S. 499. The set-off question presented in the instant case was not involved.

For a period of years it has been the understanding of the Comptroller of the Currency that only such demands as were mutual at the time of an insolvent national bank's suspension, that is, beneficially owned by the same parties in the same right, can be made the basis of set-off. *Scott* v. *Armstrong, supra; Yardley* v. *Clothier,* 49 Fed. 337. Under this rule correspondent banks have been permitted to set-off against receivers' balances mutual demands beneficially owned

by the correspondent bank at suspension *but the right to set-off demands held by the correspondent bank in a representative capacity, and consequently beneficially owned by its customers, or others, has been denied.* The Comptroller of the Currency understands that this position was sustained by the United States Circuit Court of Appeals for the Fourth Circuit in *Federal Reserve Bank of Richmond* v. *Early,* 30 Fed. (2nd) 198 (in so far as the same concerned set-off against the cash surrender value of the reserve bank stock), by the United States Circuit Court of Appeals for the Eighth Circuit in *Hirning* v. *Federal Reserve Bank of Minneapolis,* 52 Fed. (2nd) 382, and in *Nomland, Receiver of the National State Bank of Stockton, Kansas,* v. *First National Bank of Kansas City, Missouri,* decided April 3, 1933, and in the authorities cited in the Receiver's supporting brief in the instant case.

The decision in the instant case appears to be in direct conflict with the principles of law constituting the basis of the uniform policy heretofore applied in all of the Circuits. The result is that until the issues in the instant case are finally settled by a decision of this Honorable Court, there will necessarily be a conconflict and inconsistency in the administration of the various receiverships, in that the previous practice will have to be followed in the districts other than the Fifth Circuit, and the principles established by the instant case will have to be observed, so far as applicable, in the Fifth Circuit. Thus the uniform system for winding up the affairs of insolvent national banks, contemplated by Congress, is made impractica-

ble in so far as the same concerns set-off of the kind here involved. *Cook County National Bank* v. *United States,* 107 U. S. 445; *First National Bank* v. *Selden,* 120 Fed. 212.

The speedy relief of depositors and creditors of insolvent banks, and banks in the hands of conservators, is a paramount public question. A decision upon the issues of law involved in the instant case, regardless of whether the decision below be affirmed or reversed, will be of inestimable aid to the Comptroller of the Currency in re-establishing a uniform policy to govern the treatment of such set-off claims, and will unquestionably substantially expedite the liquidation of national banks in receivership or in conservatorship by making possible the disposition of numerous other pending suits involving the same issues, and by eliminating future litigation of the same type.

III.

Conclusion.

The Comptroller of the Currency therefore earnestly urges this Honorable Court to entertain the petition for writ of certiorari filed by the Receiver in the instant case.

Respectfully submitted,

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for F. G. Awalt,
Acting Comptroller of the Currency.

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CORRECTED COPY

see dissent p. 2

SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1933.

L. M. Dakin, Receiver of First National Bank of St. Petersburg, Petitioner,

vs.

Taver Bayly, Liquidator of The Peoples Bank of Clearwater.

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 20, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

This was an action on the common counts and on an account stated brought in the United States District Court for Northern Florida by the receiver of First National Bank of St. Petersburg, Florida, against the Peoples Bank of Clearwater, Florida, a state bank. In addition to pleas of the general issue the defendant pleaded specially that the St. Petersburg bank was indebted to the defendant in a sum in excess of plaintiff's claim, by virtue of the delivery to defendant of four drafts drawn by plaintiff on the Chase National Bank of New York to the defendant's order, which had been dishonored.

The plaintiff replied that certain checks or drafts drawn on the St. Petersburg bank or other banks in St. Petersburg were deposited for collection with the Clearwater bank; were forwarded by the Clearwater bank to the St. Petersburg bank for collection; the St. Petersburg bank collected the items drawn on it by charging the accounts of its depositors and those on other local banks by settlement of balances with them; the four drafts in question were sent to the Clearwater bank as remittances of the amounts so collected, pursuant to the collection letters accompanying the checks; neither bank carried an account or deposit in the other, and for a long period each bank had been sending checks and drafts to the other for collection and remittance; and averred that by reason of the facts stated there was no mutuality in the debts or demands existing between the parties at the time the action was brought,

and the defendant was not entitled to the set-off sought in its pleas. The District Court sustained a demurrer to the replication, and, as plaintiff refused to plead further, entered judgment for the defendant for the excess of its demand. The plaintiff appealed to the Circuit Court of Appeals, where the present respondent was substituted as appellee, the Clearwater bank having gone into liquidation. That court affirmed the judgment, and, upon the plaintiff's petition, we granted certiorari.

The statute of Florida[1] permits set-off of "demands mutually existing . . . at the commencement of the action". The question is whether the debts were mutual. The Circuit Court of Appeals answered in the affirmative, basing the decision on the section of the Florida statutes which provides:[2] "The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument", saying that since the Clearwater bank might maintain a suit in its own name for the amount due by the petitioner the demand might be set off; and that it was a matter of no concern to the petitioner whether the Clearwater bank held the checks for collection or for value. The petitioner urges that this holding bases the right of set-off upon a rule of procedure and ignores the substantive requirement that the demands must be mutual in quality; and says that the debt of the St. Petersburg bank was not to the Clearwater bank, which was a mere collecting agent, but to the depositors. The conclusion is that while the Clearwater bank individually owed the receiver of the St. Petersburg bank, the latter did not owe the former, but at best the claim was made as an agent. If this be true set-off may not be allowed, for a defendant sued upon his individual debt may not avail himself for this purpose of a demand against the plaintiff held in a fiduciary capacity. *Central National Bank* v. *Connecticut Mutual Life Ins. Co.*, 104 U. S. 54; *Libby* v. *Hopkins*, 104 U. S. 303; *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502; *United States* v. *Butterworth-Judson Corp.*, 267 U. S. 387, 394-5; *Thomas* v. *Potter Title & Trust Co.*, 2 F. Supp. 12.

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[1] "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set-off, and may be pleaded accordingly." Compiled General Laws of Florida, § 4326.

[2] Compiled General Laws of Florida, § 6810.

Were the cross-demands of the parties of the same quality, or, to state it otherwise, did each claim from the other in the same right? In the ordinary case the unrestricted endorsement and deposit of checks with the Clearwater bank would create the relation of debtor and creditor and the bank would collect the items not as agent for the depositors, but as owner. *Exchange National Bank* v. *Third National Bank,* 112 U. S. 276; *City of Douglas* v. *Federal Reserve Bank of Dallas,* 271 U. S. 489. A statute of Florida, however, requires of the bank of deposit only due diligence in the forwarding of such a check for collection and in the absence of negligence conditions liability for the amount of the check on receipt of final payment from the collecting bank.[3] The parties are presumed to have contracted with reference to this statute (*Federal Reserve Bank* v. *Malloy,* 264 U. S. 160), and the situation is as if they had expressly agreed that the Clearwater bank was to act as agent only and was not to become the debtor of the depositors unless and until it had received actual and final payment of the checks. Since, then, the Clearwater bank acted as the agent of depositors in forwarding checks to the St. Petersburg bank, the depositors have a right of action against the latter for any default in collection or remittance. *Federal Reserve Bank* v. *Malloy, supra;* see also *City of Miami* v. *First National Bank,* 58 F. (2d) 561. The Florida courts have reached the same conclusion. *Atlantic National Bank* v. *Pratt,* 95 Fla. 822; *Edwards* v. *Lewis,* 98 Fla. 956; *Myers* v. *Federal Reserve Bank,* 101 Fla. 407.

Much is made of the absence of any showing that the Clearwater bank did not credit the depositors in account immediately on receipt of the items for collection; but in the absence of evi-

[3] "When a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid." Compiled General Laws of Florida, § 6834.

dence to the contrary we must assume the relation was what the statute made it—one of mere agency rather than one of debtor and creditor. As was said in the *Malloy* case, the effect of the statute might be avoided by agreement or by clear and certain custom known to the depositor, but no such agreement or custom was pleaded by the defendant. The replication asserts the checks were deposited with the Clearwater bank for collection and were forwarded to the St. Petersburg bank for collection and remittance, and the defendant's demurrer admits these averments. On this record we are bound to hold that the St. Petersburg bank stands in the relation of agent to the individual depositors of the items and is liable to them for failure to remit cash or equivalent in satisfaction of the amounts collected. The Clearwater bank must therefore sue as representative or agent of depositors, for a recognition of its right to sue as owner would destroy the cause of action of the depositors against the St. Petersburg bank or leave that bank subject to a possible double liability. If the cross-demand is asserted in an agency capacity the debts are not held in the same right by the two banks, lack mutuality, and the one cannot be set off against the other; if it is asserted by the Clearwater bank as owner of the drafts the demand cannot be maintained, for the reason that no showing is made that the agency relationship was altered to that of debtor and creditor.

The respondent, however, seeks to support the judgment on another ground. He says that the Clearwater bank accepted the drafts, forwarded by the St. Petersburg bank, as payment, thus assumed ownership of them, acknowledged the change in the relationship to its depositors from that of collecting agent to that of debtor, and so properly pleads the off-set. We think this position cannot be maintained.

As respects the setoff of cross-demands the rights of the parties became fixed at the moment of the insolvency of the St. Petersburg bank and consequent suspension of payment, *Scott* v. *Armstrong*, 146 U. S. 499, 511; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290; and the right to set off is governed by the state of things existing at the moment of insolvency, not by conditions thereafter arising, *Yardley* v. *Philler*, 167 U. S. 344, 360, or by any subsequent action taken by any party to the transaction, *Evansville Bank* v. *German-American Bank*, 155 U. S. 556. What, then, was the situation as disclosed by the record, when the St. Petersburg

bank closed its doors? That bank, as sub-agent for the Clearwater bank's depositors, had made collection and sent the drafts for the amount to the Clearwater bank. It is incorrect to say that the St. Petersburg bank paid the amounts collected by forwarding drafts to the Clearwater bank, or that the Clearwater bank upon receipt of the drafts was bound to accept them as payment and its depositors were likewise thereupon bound to treat the agency of the Clearwater bank and that of the St. Petersburg bank as ended and the relation of debtor and creditor as established between them and the Clearwater bank. Equally inaccurate is the assertion that receipt and retention of the drafts required the Clearwater bank, unless its depositors asserted ownership of them, at once to credit the depositors with the amount of the items represented by the drafts. The bank was not bound to assume the relation of debtor until, in the words of the statute, it had received final payment, i. e., cash or its equivalent, and we should not presume that it did so.

Until these drafts were paid the sub-agent had not discharged the obligation resting upon it, and remained liable to suit by the persons whose checks had been forwarded for collection and remittance, *Bank of Washington* v. *Triplett & Neale*, 1 Pet. 25; *Wilson & Co.* v. *Smith*, 3 How. 768; *Federal Reserve Bank* v. *Malloy*, *supra*. While the drafts were in course of collection the St. Petersburg bank failed. At the moment of suspension it remained liable as sub-agent to the depositors of the Clearwater bank, as we have shown. Could it also be subjected to an independent liability to the Clearwater bank? Was it not entitled to treat the agency relation originally existing as still in force, in the absence of notice from the owners of the collection items that the status had been altered? Could any position taken by the Clearwater bank of its own initiative, affect without the depositor's consent the preexisting relation of principal and sub-agent between the depositors and the St. Petersburg bank? We think not. Compare *Evansville Bank* v. *German-American Bank*, *supra*. Those depositors had an election either to sue the St. Petersburg bank or to bring action against the Clearwater bank for want of due diligence, or to treat the drafts as payment and hold the Clearwater bank as their debtor, but there is no intimation in the record that they made any election prior to the sub-agent's insolvency, nor indeed that they then knew whether collection had been effected or remittance received by the Clearwater bank. There is

no reason to presume that they elected to stand on their cause of action against the Clearwater bank for lack of due diligence in accepting drafts instead of currency, and thus created a right of action in that bank against the St. Petersburg bank by way of subrogation, or to affirm that the agency had terminated and its status become that of a debtor. Nor is any custom pleaded whereby the Clearwater bank was to become the debtor of the depositors of the checks upon receipt of something other than cash or equivalent from the sub-agent. Compare *Federal Reserve Bank* v. *Malloy*, *supra*.

This view does not, as claimed, permit the St. Petersburg bank to assert on behalf of the owners of the checks an ownership in the drafts which they have never claimed. On the contrary the sub-agent merely asserts its continuing liability to its principals as a reason why the forwarding agent may not, without showing the agreement of the principal, seek to assert another and a different cause of action based on alleged ownership of the drafts by the forwarding bank. The question is not one of transference of ownership of the drafts to the customers of the Clearwater bank, but of the attempted use by that bank of the cause of action on the drafts as its own in the teeth of the undenied existence of another cause of action arising out of the same transaction in favor of the bank's principals. *Bank of The Metropolis* v. *New England Bank*, 1 How. 234, presented a totally different situation from that here disclosed. In that case the forwarding bank, for all that appeared, was the owner of the paper. There was neither contract nor statute to the contrary. The course of dealing between the forwarding and the collecting bank was for the mutual exchange of items for collection, which each treated as owned by the other, and the credit of the items as received in an account of the sender and periodical settlement of the balances of account. When the forwarding bank failed it notified the collecting bank that certain items then held for collection belonged to the New England bank. In a suit by the latter against Metropolis bank the defense was that at the date of the forwarding bank's failure there was due from it to the Metropolis bank more than the amount claimed. The defense was held good, this court saying:

"We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other,

credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."

But here we have no credit extended by the St. Petersburg bank to the Clearwater bank on the faith of the checks forwarded for collection and no mutual deposit accounts, but a mere agency evidenced by a collection letter requiring collection and remittance. The fact that no credit was extended to the forwarding bank by the collecting bank, leaves it open to the depositor to assert his claim against the latter even though it had no notice that the relation between the depositor and the forwarding bank was one merely of agency. See *Sweeny* v. *Easter*, 1 Wall. 166; *Beaver Boards Cos.* v. *Imbrie & Co.*, 287 Fed. 158, 163.

The respondent was not entitled to set off an asserted cause of action in its own right based on the drafts drawn by the petitioner. The suggestion that the petitioner's demand was for the amount of checks the Clearwater bank had collected and failed to remit is beside the point. If the petitioner was for that or any other reason not entitled to sue in its own right, the fact would only be a further reason for denying the set-off.

The judgment must be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1933.

L. M. Dakin (Successor to A. M. Anderson) as Receiver of the First National Bank of St. Petersburg, Petitioner,
vs.
Taver Bayly as Liquidator of The Peoples Bank of Clearwater.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 20, 1933.]

Mr. Justice Stone.

I think the judgment should be affirmed.

The case was tried upon the pleadings alone, and we are asked to determine an important question of law on only a partial presentation of the facts upon which its correct solution depends. Upon the facts disclosed, it would seem that the petitioner could not rightly defeat respondent's counterclaim by setting up that the drafts, which are the subject of it, are held by the Clearwater bank upon an agency in behalf of some of its depositors which they are not bound and have not chosen to assert. But even if that could properly be allowed, the burden rests on petitioner to show that the agency of the Clearwater bank created by the deposit of the items for collection, was continued with respect to the drafts which are the subject of the counterclaim so that they were held by the collecting bank as agent, not as owner. This the petitioner has failed to do.

From the pleadings it appears that the checks were deposited with the Clearwater bank by its customers, in the usual course, for collection, and were forwarded by it, in turn, to the St. Petersburg bank for collection; that the St. Petersburg bank collected the checks and paid the amount of the collection to the Clearwater bank by the drafts in question, made payable to its order. The two banks had each, for a long time, been sending drafts and

checks to the other for collection and remittance, and the demand of the St. Petersburg bank, to which the counterclaim was interposed, was for an amount similarly due for items which it had collected for the Clearwater bank. It is not shown what credits were given by the Clearwater bank to the depositors for the checks when received, or that any of them were restrictively endorsed, or that in the transactions between the two banks either appeared to the other to be acting otherwise than as owner of the checks which it forwarded for collection. See *Douglas* v. *Federal Reserve Bank*, 271 U. S. 489. On the argument it was conceded that all were endorsed without restriction. There is no allegation that the Clearwater bank ever held the drafts, received from the St. Petersburg bank, as agent for its depositors and none that the depositors ever asserted such an agency, or that they have made any claim to the drafts. Whether or not, in the usual course of business, it credited its depositors with the amount of the drafts on their receipt is not revealed.

The authority and duty of the Clearwater bank, as an agent for collection, was to receive legal tender in payment of the collection items, and nothing else. In receiving and retaining the drafts made payable to its own order, without designating the bank as agent, it took them, not as agent, but for its own account. By taking them in payment it discharged the drawers of the collection items. Having thus precluded collection in legal tender, it at once became the bank's duty to credit its depositors with the items collected. *Federal Reserve Bank* v. *Malloy*, 264 U. S. 160, 168. By thus crediting the drafts it would have performed fully its duty as a collecting agent, for such a credit was all that was expected or could have been required if the collection had been made in legal tender. In either case the agency would then have come to an end beyond recall, the bank would have become a debtor to its depositors and the unqualified owner of the drafts which it had accepted in payment of the collections. See *Commercial Bank of Penn.* v. *Armstrong*, 148 U. S. 50, 58; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 501; *Phoenix Bank* v. *Risley*, 111 U. S. 125; *Burton* v. *United States*, 196 U. S. 283, 297; *Douglas* v. *Federal Reserve Bank*, *supra*. There is no presumption, even under the Florida statute, that an agency of a bank to collect paper for its depositors survives the receipt by it of drafts in payment of the collection. Its survival

necessarily depends on specia' circumstances not here disclosed. It cannot be presumed, in the absence of appropriate allegations or proof that the depositors have claimed any ownership in the drafts or that in the absence of such claim the Clearwater bank did not, as it was legally bound to do, credit its depositors with the amount of the drafts on or after their receipt, or that it afterward occupied any relationship to its depositors other than that of debtor. There is thus a failure to allege directly, or by any necessary inference, the essential facts on which the petitioner's case depends to show that the depositors of the Clearwater bank have any right to treat the drafts in its hands as their property.

But even if we are to say on this record that the depositors were entitled to claim ownership of the drafts in the hands of the Clearwater bank, they have not done so, and the St. Petersburg bank may not assert for them an interest in the drafts which they are not bound to assert and have never claimed for themselves. Unless *Federal Reserve Bank* v. *Malloy, supra,* on which the opinion of the Court relies, is to be overruled, neither the St. Petersburg bank nor the Clearwater bank could treat the depositors of the latter as owners of the drafts without their consent. In that case, which arose under the statute of Florida involved in the present case, the bank had received paper restrictively endorsed for collection from another bank which had received it from its customer. In turn it forwarded the paper to another bank for collection, from which it took a draft, payable to its own order, in payment of the collection item. This Court held that the bank received the paper as agent to collect it but that in receiving the draft as payment instead of legal tender, the forwarding bank acted outside its agency. Hence it could not treat the owner of the paper sent for collection as the owner of the draft which it had thus wrongfully received, without his consent or ratification. Here the rights of the Clearwater bank upon the drafts had accrued before the receivership of either bank. What their rights then were they continued to be unless they were altered by some act of its depositors. Ownership of the drafts was not in suspension. It had already been lodged in the Clearwater bank by its own unauthorized act. Some affirmative act of ratification or adoption was necessary by its customers before the wrongful act of the Clearwater bank could be relieved of its consequences and before the burden of ownership acquired by it in its own right, because without authority, could

be transferred from it to its depositors. Allowance of the counterclaim upon the drafts, like payment of them before such an act of adoption, obviously could not result in double liability of the St. Petersburg bank, since the payment or allowance would be made to the one entitled to receive it.

Other circumstances make the present case an even plainer one for denying to the petitioner any right to assert that the drafts, which the Clearwater bank received and is compelled to hold as owner, are held upon an agency. The two banks, as the court below pointed out, were mutual agents for collection. On the record we must take it that they dealt with each other as the owners of the collection items which each bank received from the other without notice of the interest in them of the other's depositors for collection. In *The Bank of Metropolis* v. *New England Bank*, 1 How. 234, 6 How. 212, this Court laid down the rule that when banks mutually act as agents for collection, each for the other, and paper transmitted for collection appears on its face to be the property of the transmitting bank and remitted for its account, they are entitled to settle their mutual demands for items collected by striking a balance, no matter who the owner of the collected items may be. Each deals, and is entitled to deal with the other in reliance upon the security of the paper, endorsed without restriction, and transmitted or expected to be transmitted in the usual course of the transactions between them. See also *Reynes* v. *Dumont*, 130 U. S. 354, 392; *Joyce* v. *Austen*, 179 U. S. 591, 597. The application here of the principle involved would not seem to be affected by the fact that drafts drawn for balances due from the one bank to the other were sent daily, rather than weekly or monthly. Even though the depositors here might have asserted an ownership in the drafts, which nevertheless they did not assert, it would be a departure from this salutary principle to say that the St. Petersburg bank can deny to the Clearwater bank the rights of ownership in the drafts which the latter cannot itself deny.

Not only has petitioner failed to sustain the burden of showing that the depositors of the Clearwater bank, or any of them, have asked or consented to be treated as owners of the drafts, or otherwise adopted the act of the Clearwater bank, but it appears that it would be to their disadvantage to do so. We need not close our eyes to the obvious fact that the only possible advantage sought in behalf of the St. Petersburg bank by resistance to the counterclaim

—the benefit of a distribution by the Clearwater bank to creditors larger than that of the St. Petersburg bank—is identical with the advantage which the depositors will retain by treating the Clearwater bank as their debtor, instead of asserting ownership in the unpaid drafts. In the circumstances, to speak of the Clearwater bank as suing upon its counterclaim as an agent and as not bearing the burden of ownership, is to speak in terms of legal fiction, not of reality. Notwithstanding our judgment denying to the Clearwater bank the right to counterclaim upon the drafts because the ownership of them is not in it but in its depositors, the depositors, if they have not already done so, are free to prove their claim against the Clearwater bank as a debtor, because they have never become owners of the drafts. The Clearwater bank, then, has no choice but to bear the burdens of ownership of the drafts which it has received and retains as owner. It should equally be entitled to the benefits. These include the right to set up the drafts as a counterclaim to its indebtedness to the St. Petersburg bank.